No.
(No. A-275)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

A.A. POULTRY FARMS, INC.,
BOOMSMA PRODUCE, INC.,
BOOMSMA PRODUCE OF MISSOURI, INC.,
GRESSEL PRODUCE CO., INC.,
HEMMELGARN & SONS, INC.,
MENDELSON EGG CO. OF WEST UNITY,
a/k/a MENDELSON EGG CO.,
PETER PRODUCE, INC.,

Petitioners,

-vs-

ROSE ACRE FARMS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In the determination of requisite harm to competition in predatory pricing cases:

   (a) Whether monopolistic recoupment should be adopted as the exclusive measure of harm to competition, even in an oligopolistic market?

   (b) Whether the holdings of the Seventh Circuit and First Circuit that predatory intent is irrelevant to the issue of harm to competition directly conflict with this Court's decision in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), and with decisions of the Ninth and Eleventh Circuits?

   (c) Whether the Seventh Circuit properly rejects all pricing below-cost standards as evidence of harm to competition, regardless of cost standard and methodology, in light of the long-standing, unanimous decisions of this Court, the circuit courts, and the district courts attaching substantial, and even controlling, weight to below-cost sales?

2. Are physically identical goods of "like grade and quality" under the Robinson-Patman Act, or does the Act exempt all perishable goods without proof of their condition and actual or imminent deterioration?

3. Whether a seller who charges uniform base prices to all customers, but who systematically, over a prolonged period, gives special discounts to certain targeted customers, is charging different prices and engaging in price discrimination?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were petitioners A.A. Poultry Farms, Inc.; Boomsma Produce, Inc.; Gressel Produce Co., Inc.; Hemmelgarn & Sons, Inc.; Mendelson Egg Company; Peter Produce, Inc.*; Boomsma Produce of Missouri, Inc; and respondent Rose Acre Farms, Inc.

Pursuant to Supreme Court Rule 28.1, petitioners state that Boomsma Produce, Inc. and Boomsma Produce of Missouri, Inc. were subsidiaries of Boom-Co, and they have now been merged into Boom-Co. None of the other petitioners is the parent, affiliate or subsidiary of any other corporation.

* Peter Produce, Inc. was dissolved on May 2, 1989.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 881 F.2d 1396 (1989) and is reprinted as Appendix A. The post-verdict opinion of the United States District Court for the Southern District of Indiana is reported at 683 F. Supp. 680 (1988) and

is reprinted as Appendix B. The earlier opinion of the district court is reported at 1988-1 Trade Cas. (CCH) ¶ 67,999 (S.D. Ind. 1986) and is reprinted as Appendix C.[1]

JURISDICTION

The opinion and order of the district court was entered on February 3, 1988 and certified the issues decided therein for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b). (B-4). Following a timely appeal, the opinion and order of the United States Court of Appeals for the Seventh Circuit was entered on August 4, 1989. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982), provides, in pertinent part, that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and

[1] References to "A" are to Appendix A, the Court of Appeals Opinion; references to "B" are to Appendix B, the District Court Opinion; and references to "C" are to Appendix C, the earlier district court opinion denying Rose Acre's motion for summary judgment. References to the transcript of the trial and to the trial exhibits are by date, page numbers, and exhibit number: *e.g.*, "Tr. 10/13/87 A.M., 91; PEx. 7".

quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ; *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

STATEMENT OF THE CASE

Total chaos exists in the federal courts concerning the relevant and necessary elements of proof in a predatory pricing case. The case below both illustrates and exacerbates this chaos. It results in marked disagreement in the construction of antitrust statutes, forum shopping, and greatly increased costs to litigants. Lack of uniformity on the basic elements in a predatory pricing case has produced a tangle of conflicting precedent that only this Court can unravel. Not only is there conflict among the circuits in the basic approaches, but the problems are manifested in this case where, after the jury verdict, the district court reversed its own key rulings and standards that guided the trial, and then the Seventh Circuit adopted yet a third, substantially different approach within the same case.

The fundamental issue on which the circuit courts disagree is this: what evidence constitutes sufficient proof of harm to competition in a predatory pricing case? The

court below, in a sweeping departure from precedent of this Court, the Seventh Circuit itself, and its sister circuits, adopted an exclusive test of monopolistic recoupment as the indispensable prerequisite for predatory pricing. (A-9-10, 13). Under Judge Easterbrook's standard, the key is not simply recoupment but recoupment through achieving *monopoly power*:

> In either case [under § 2 of the Sherman Act or under the Robinson-Patman Act], the gravamen is that the aggressor sold goods for too little money, hoping to cripple or discipline rivals so that it might sell its wares for a *monopoly* price later, recouping the losses and adding a hefty profit, to the detriment of consumers.

(A-7) (emphasis added). In importing this unworkable Sherman Act standard of monopolistic recoupment into predatory pricing cases under the Robinson-Patman Act, the court below expressly eliminated predatory intent from consideration in a predatory pricing case. (A-13). It further rejected the universally accepted concept of persistent pricing below cost as proof of harm to competition, dismissing all cost standards as equally irrelevant. (A-7-8).

Moreover, the court below adopted a new rule making it virtually impossible to prove a violation of the Robinson-Patman Act for a perishable commodity. It accomplished this by reversing the statutory burden of proof dictated by Section 2(a) of the Robinson-Patman Act, which has profound effects in the perishable commodity markets. The court ruled for the first time as a matter of law that commodities, including eggs yet unlaid, that may perish any time in the future are not of "like grade and quality" as required by Section 2(a), thereby eviscerating the Robinson-Patman Act as applied to the grocery industry, which the Act was explicitly designed to control. Physically identical eggs are, by the opinion, admittedly treated as *un*like,

and *un*laid eggs promised for future delivery are somehow also presumed to be exempt or deteriorating. The Seventh Circuit thus sustained that portion of the district court's ruling (B-47-49) which mandated a *per se* exception for commodities with a finite shelf life that necessarily applies to *all* food items and shifted the burden of establishing an affirmative defense of imminent deterioration under the Act from the defendant seller to the plaintiff, contrary to the Act itself and Supreme Court precedent. (A-22-23).

Despite Judge Easterbrook's allegation of "[w]idespread civil disobedience in the judiciary . . . to [this Court's decision in] *Utah Pie*" (A-16), and the conflicting criteria among the circuits, the decision below is the most radical departure from the Robinson-Patman Act. It directly follows then-Professor Easterbrook's well-known position and agenda for abolishing the Robinson-Patman Act, including as subsidiary points his contentions that intent and below-cost pricing are irrelevant and "unproductive" standards. For example, in *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 281, 337 (1981), Professor Easterbrook wrote that "[t]he antitrust offense of predation should be forgotten.":

> The theoretical case for a rule against predation is too weak, the damages measures too inaccurate, and the administrative costs too high to justify intervention designed to control the prices charged by rivals.

Id. at 265. Under the guise of "streamlining" antitrust law (A-12), and while professing merely to attack *Utah Pie*, Judge Easterbrook is actually accomplishing his objective of repealing the Robinson-Patman Act, both in its fundamental principles and by altering its burdens of proof. However, as this Court aptly concluded in *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436

(1983), "[t]he determination whether to alter the scope of the [Robinson-Patman] Act must be made by Congress, not by this Court . . ." or by the Seventh Circuit.

The court below drastically departs from well-established precedent, engages in supposition which finds no support in the record, and creates non-existent facts, all resulting in deconstruction of the antitrust statutes. Furthermore, litigants and the lower federal courts are floundering in a sea of conflicting and contradictory standards for proof of harm to competition in predatory pricing cases. The issues presented here are therefore of exceptional national significance which warrant review and resolution by this Court.

A. Statement of Facts

This is a "primary line" Robinson-Patman Act case brought against the respondent, Rose Acre Farms, Inc. ("Rose Acre"), for systematic illegal price discrimination over several years in the sale of eggs to ten targeted customers. Petitioners here are the seven plaintiffs who individually competed with Rose Acre in geographic markets in the Midwest in processing shell eggs. (A-2; B-8-9). Even Judge Easterbrook conceded that the jury heard evidence of the accelerated oligopolistic trend in egg processing markets. (A-4). The continuing trend was shown, in part, by the departure of over 75%, or 3,300, egg processors between 1976 and 1986. By that time, only 13 firms in four midwestern states processed at least 10,000 cases of eggs per week, and the entry barriers had risen so that the minimum optimum size for an egg processor required handling at least 10,000 cases per week from about one million laying hens. (Tr. 10/13/87 A.M., 91-92; PEx. 7).

In the 1970's, Rose Acre began a major plant expansion and new marketing program. As part of its expansion program, Rose Acre borrowed $13 million (an amount more than the book value of its assets (PEx. 40B)) to build additional production facilities. The new facilities ultimately generated not occasional short-run surpluses but rather 400 million eggs (PEx. 55) to be marketed each year despite the inelastic demand for eggs, the slow market increase in demand, and the grocery wholesalers' and retailers' narrow competitive profit margins—often averaging one percent.

To market the additional production, Rose Acre chose not to cut its prices across the board (which would cause it huge losses) but instead offered selective discriminatory prices to a few large, targeted customers. Rose Acre engaged in a persistent strategy that overcame these obstacles and resulted in dramatically increased revenues. Rose Acre priced its eggs without regard to its costs of production. (A-4-5).[2] The ten large customers of petitioners targeted by Rose Acre were located outside Indiana and each was supplied by one, or occasionally two, of the seven petitioners. Before 1978, Rose Acre sold virtually no eggs beyond a 100-mile radius of Indianapolis, Indiana. (Tr. 10/19/87 P.M., 59).

Rose Acre's tremendous growth was accomplished by the selective offering of "special" prices on eggs that were

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[2] Rose Acre's persistent pricing strategy, directed at *select* customers, involved three steps: (1) offering each one discriminatory prices that it progressively lowered until the customer's business was finally obtained; (2) maintaining those prices for a substantial period to firmly secure the customer's business; and (3) then raising prices offered to the customer by decreasing the frequency of the discriminatory price concessions. (Tr. 10/7/87 A.M., 43-45; Tr. 10/8/87 A.M., 79-80, 86; PEx. 94 at 8-10).

below its average total cost, below its long run incremental cost, and even below its average variable cost. The court below obscured the sales below *any* conceivable cost standard by merely conceding that "the jury in this case would have been entitled to conclude that Rose Acre sold some of its eggs, some of the time, for less than average total cost." (A-19).

B. Prior Proceedings

The complaint, later amended, was filed on April 21, 1981, alleging a violation of Section 2(a) of the Clayton Act of 1914, as amended by the Robinson-Patman Act of 1936, 15 U.S.C. § 13(a) (1982), against Rose Acre, based on illegal price discrimination. On December 1, 1983, Rose Acre moved for summary judgment. On November 17, 1986, the district court denied Rose Acre's motion for summary judgment. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 1988-1 Trade Cas. (CCH) ¶ 67,999 (S.D. Ind. 1986) (Appendix C).

The trial of the Robinson-Patman claims was conducted from October 5 through 23, 1987. The jury returned verdicts in plaintiffs' favor, separately assessing two categories of actual damages as to each of the seven plaintiffs. Those verdicts totaled $9,265,634, subject to trebling pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982). Post-trial motions followed. On November 6, 1987, Rose Acre moved for a judgment notwithstanding the verdict ("judgment n.o.v.") and, alternatively, for a new trial on the plaintiffs' Robinson-Patman claims. On February 3, 1988, the district court entered its opinion granting Rose Acre's motion for judgment n.o.v., and alternatively a new trial. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680 (S.D. Ind. 1988) (Noland, J.) (Appendix B).

The district court, acknowledging "the voluminous documentary evidence" (B-17 n.4) of price discrimination, found that Rose Acre made contracts guaranteeing customers "a specific number of . . . specials" (B-17) which varied from Rose Acre's base prices and that "Rose Acre did not offer the same quantity of specials to each of its customers, nor did it sell all of its specials to the various customers at the same price." (B-23). The court nonetheless held that plaintiffs had failed to prove "injury to competition." (B-46). Additionally, the district court concluded that a judgment n.o.v. was also warranted because all of Rose Acre's discriminatory sales over the five-year period were within the "changing conditions" exception to Section 2(a) of the Robinson-Patman Act (B-49), even though Rose Acre made no showing that even one of its "special" sales of millions of eggs over the relevant years involved imminently deteriorating goods.

Following petitioners' timely appeal of the district court's February 3, 1988 decision, the Seventh Circuit issued its opinion on August 4, 1989, affirming the district court's decision, but on other grounds. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989) (Appendix A).

REASONS FOR GRANTING THE WRIT

I(A).

Monopolistic Recoupment Cannot Be The Only Evidence To Show Harm To Competition In Predatory Pricing Cases, Particularly When The Predatory Seller Is Part Of An Oligopolistic Market.

In predatory pricing cases, either under the Sherman Act or the Robinson-Patman Act, the plaintiff has the statutory burden to show harm to competition. Under the Robinson-Patman Act, the requisite threshold is expressly different from and lower than that of the Sherman Act: only price discrimination which "*may* . . . substantially lessen competition . . . in any line of commerce" needs to be demonstrated. 15 U.S.C. § 13(a) (emphasis added).

It has been recognized generally that harm to competition can be satisfied by either actual competitive injury or predatory intent proven by either express evidence of predatory intent or the inference of predatory intent by showing pricing below cost.[3] The debate in the circuits as to the appropriate standards by which to establish predatory intent has raged for over a decade and finally has come to a head with the Seventh Circuit's recent decision in *Rose Acre*, further exacerbating the conflict.

The Seventh Circuit would now abolish both predatory intent and pricing below cost as means to establish harm to competition. In place of these two long-standing

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[3] *See O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97, 103-104 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973).

methods of proof, the court below adopted monopolistic recoupment as the only means to show harm to competition and has applied that standard to Robinson-Patman Act cases, as well as to Sherman Act Section 2 cases.

The court below opined that in either a Robinson-Patman Act or Section 2 Sherman Act case, "the gravamen is that the aggressor sold goods for too little money, hoping to cripple or discipline rivals so that it might sell its wares for a *monopoly price* later, recouping the losses and adding a hefty profit, to the detriment of consumers." (A-7) (emphasis added). Relying on Sherman Act tying cases, the court proceeded to state that, as a matter of law, single-firm shares of 30% or less cannot establish a monopoly. (A-14).[4] The court then concluded that because Rose Acre did not occupy such a market position, it could not have recouped its losses through a monopoly price later. (A-13-14).

In adopting a monopolistic recoupment test as the sole basis for establishing liability in a predatory pricing case, the lower court erroneously limits Robinson-Patman Act predation to a monopolist and effectively rejects the Act's protection against an oligopolist such as Rose Acre.[5] An

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[4] One of the very cases the court below relies on in articulating this so-called rule of law is *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 (1953), which expressly recognizes that "no magic inheres in numbers[.] The relative effect of percentage command of a market varies with the setting in which that factor is placed." Also, in creating this so-called rule of law, the lower court dangerously ignores the oligopolistic market setting where often no one competitor, by the nature of the market, possesses a 30% share.

[5] As defined by Professors Areeda and Turner: "An oligopoly market is one in which a few relatively large sellers account for all or the bulk of the output. . . . Oligopoly differs from monopoly

(Footnote continued on following page)

oligopolistic market by its definition or nature will not be dominated by one seller. The nature of the goods and geographic distribution limitations, among other factors, dictate that some markets will never have a single seller in a dominant market position capable of recouping its losses with monopolistic higher prices. Such an economic reality does not mean that any seller in such an oligopolistic market should be allowed free rein to manipulate prices to drive out smaller competitors or, as is a common oligopolist's objective, to deter and exclude new entrants. Establishing monopolistic recoupment as the only evidence of harm to competition will permit just that, and such a construction nullifies the Robinson-Patman Act.

While "oligopoly is a weaker form of monopolization than the single firm . . . it is not so weak a form that it can be left to its own devices." G. Stigler, *Monopoly and Oligopoly by Merger*, The Organization of Industry 105-106 (1968). The Robinson-Patman Act's legislative history shows that its drafters intended to protect against an oligopolist's predation: "only through such . . . injuries . . . can the larger general injury [to competition] result, and to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936), *reprinted in* E. Kintner, *Legislative History of the Antitrust Laws* 3012, 3015 (1978). Accordingly, the Robinson-Patman Act must apply to the oligopolist who is engaged in price discrimination "where the effect of

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[5] *continued*
in that no one firm can unilaterally determine market price by varying its output because leading rivals can offset or magnify the effect by output changes of their own . . . . [T]he distinctive characteristic of oligopoly is interdependence among the leading firms: the profit-maximizing choice of price and output for one depends on the choices made by others." 2 P. Areeda & D. Turner, *Antitrust Law*, ¶ 404 at 272-73 (1978).

such discrimination may be substantially to lessen competition . . . in any line of commerce. . . ." 15 U.S.C. § 13(a).

Moreover, as demonstrated by Rose Acre, an oligopolist can recoup lost profits later.[6] Recoupment can also be accomplished by creating high entry barriers to limit the number of competitors.[7] An oligopolist can also recoup its lost profits, as did Rose Acre, by using its market power to increase substantially the degree of concentration in a market, even though falling far short of a monopoly. (PEx. 30 at ex. C).

Accordingly, the lower court's requirement of monopolistic recoupment as the sole evidence of harm to competition ignores harmful price discrimination by the oligopolist. Such a decision creates total chaos among the circuits regarding the prevailing standards to establish harm to competition in predatory pricing cases. This confusion results in a lack of uniformity in the construction of the federal antitrust statutes, forum shopping, and greatly increased costs to litigants who are uncertain and at risk as to what conduct constitutes harm to competition.

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[6] For example, in 1977, Rose Acre charged a base price four cents off Urner-Barry, whereas in 1981, its base price had fallen to eight cents back of Urner-Barry. The impact of Rose Acre's price manipulation resulted in a dramatic downward spiral of market prices. In 1977, Chicago's average egg price was 0.89 cents per dozen below New York City's egg prices. By 1981, Chicago prices had fallen 4.24 cents below New York City. (PEx. 63). As established at trial, the timing and depth of the decline was directly related to Rose Acre's discriminatory pricing strategy. When Rose Acre abandoned its price discrimination after 1981 when suit was filed, Chicago's egg prices rebounded. (PEx. 63).

[7] Here, in early 1976, there were 4,394 egg processors. By 1986-1987, there were fewer than 903 nationally and only 167 in four midwestern states: Indiana, Ohio, Illinois, and Michigan. (Tr. 10/13/87 A.M., 91; PEx. 52-14ee).

I(B).

The Square Split Between The Seventh And First Circuits And The Eleventh And Ninth Circuits On Whether Predatory Intent Is Relevant As Evidence Of Harm To Competition Should Be Resolved By This Court.

The decision below draws the battle lines on the sharp split among the circuits as to whether intent remains a basis of liability in a predatory pricing case. This square split produces unequal justice in that now the forum determines whether proof of intent is relevant in a predatory pricing case.

Quoting *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 548 (1960), this Court noted that in a predatory pricing case "the decisions of the federal courts in primary line competition cases . . . consistently emphasize the unreasonably low prices and the predatory intent of the defendants." *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696 n.12 (1967). However, rejecting those long-standing precedents, the court below, in disagreeing with the Eleventh and Ninth Circuits and following the First Circuit, stated that intent should not be a basis of liability in a predatory pricing case. (A-13).[8]

While there are critical differences between the Sherman and Robinson-Patman Acts, as noted in Part I(A) above, courts recognize no substantive distinction on the

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[8] *See McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1496 (11th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 2110 (1989); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1027-28 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *see also U.S. Philips Corp. v. Windmere Corp.*, 861 F.2d 695, 703-704 (Fed. Cir. 1988), *cert. denied sub nom., North American Philips Corp. v. Windmere Corp.*, ___ U.S. ___, 109 S. Ct. 2070 (1989); *cf., Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983).

issue of predatory intent.[9] Accordingly, this Court should resolve the issue of intent because now neither lawyers, clients, nor courts know whether intent is relevant in showing liability in a Robinson-Patman Act or any other predatory pricing case.

I(C).

The Seventh Circuit's Rejection Of All Cost-Price Comparisons For Proving Harm To Competition Conflicts With A Long Line Of Federal Court Cases Employing Such An Analysis.

This Court has "defined predatory pricing as either '(i) pricing below the level necessary to sell the [seller's] products, or (ii) pricing below some appropriate measure of costs.' "[10] Pricing below cost is a standard that has been consistently employed by this Court to determine antitrust injury. Following this Court's lead, the lower federal courts have uniformly employed a price-below-cost analysis, although the exact measurement of cost has been approached in various ways by the courts in different circumstances.[11]

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[9] *See, e.g., William Inglis & Sons, supra* note 8, 668 F.2d at 1042.

[10] *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118 n.12 (1986) (*quoting Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986)).

[11] *See C.A.T. Industrial Disposal, Inc. v. Browning-Ferris Industries, Inc.*, 884 F.2d 209, 210 (5th Cir. 1989) (predatory pricing is price below cost); *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989) (accord); *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 483 (1st Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 789 (1989) (predatory price is a price below some measure of cost set with the intent to eliminate competition); *McGahee v. Northern Propane Gas Co., supra* note 8, 858 F.2d at 1503 (11th Cir.) (prices above average total costs not predatory); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344-46 (8th Cir. 1987) (price must be below average variable cost to

(Footnote continued on following page)

Here, however, the Seventh Circuit struck out on a contrary course which breaks with the established precedent of price-cost analysis and rejected it as evidence of predatory conduct.[12] (A-7-8).

This case is particularly appropriate for review of the relevance of cost-price standards since the evidence shows that Rose Acre sold below *any* of the judicially applied standards. While the Seventh Circuit opinion mentions

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[11] *continued*

be predatory); *Instructional Systems Development Corp. v. Aetna Casualty and Surety Co.*, 817 F.2d 639, 648 (10th Cir. 1987) (pricing below average variable cost an indicator of predation); *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 980, 1006 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985) (criticism of various cost standards); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056-58 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (pricing below marginal or average variable cost presumed illegal); *Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 698 F.2d 1377, 1386 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983) (pricing above average total costs may be deemed predatory upon showing of predatory intent); *William Inglis & Sons Baking Co., supra* note 8, 668 F.2d at 1041 (9th Cir.) (plaintiff shows predation by price below average variable cost); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 87-88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) (some measure of price below cost); *O. Hommel Co. v. Ferro Corp., supra* note 3, 659 F.2d at 352 (3d Cir.) (predatory intent not inferred from sales at or above average variable cost); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (price above average variable cost presumed lawful). Similarly, the Seventh Circuit, before the instant case, also espoused an analysis of price-below-cost in determining predatory pricing. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1111-31 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

[12] This approach is consistent with Judge Easterbrook's known views on the issue. *See* Easterbrook, *Predatory Strategies and Counterstrategies, supra*, 48 U. Chi. L. Rev. at 281 ("any approach to predation emphasizing below-cost pricing as a device to drive out rivals is unproductive").

only the sales below average total cost (A-19), the record shows that Rose Acre also persistently sold below the more rigorous standards of long-run incremental *and* average variable or marginal costs.[13] Thus the issue here is not *which* cost standard[14] but whether the courts may rely on *any* cost standard to show harm to competition—with the court below choosing the most extreme position and answering that question in the negative.

The Seventh Circuit silently ignored that Rose Acre's prices on all eggs sold during the entire fiscal year from July 1, 1979 to June 30, 1980 were below its average variable cost for that period. (PExs. 96, 97, 98; Tr. 10/8/87 A.M., 96, 112-113; Tr. 10/13/87 A.M., 22-23). This time period is far longer than periods of below-cost special pricing other federal courts have held establish Robinson-Patman liability.[15]

Plaintiffs' extensive proof of below-cost pricing under even the most rigorous analyses employed by the federal

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[13] PExs. 52-8a, 52-8b, 52-8c, 96, 97, 98; Tr. 10/7/87 A.M., 75-81; Tr. 10/8/87 A.M., 96, 112-113; Tr. 10/13/87 A.M., 22-23, 65-86.

[14] Petitioners are not suggesting that this Court address the question of the exact measure of cost to be employed in the price-below-cost analysis. It is unnecessary to do so here and the issue may best be left to a case by case determination which can respond to the variety of factors inherent in a particular market. Whatever the cost measurement, as the Seventh Circuit in the case below noted, this Court has indicated in the *Utah Pie* and *Matsushita* cases, "that the relation between price and cost matters." (A-19). *See also Cargill, supra* note 10, 479 U.S. at 118 n.12.

[15] *See National Dairy Products Corp. v. Federal Trade Commission*, 412 F.2d 605, 609, 610, 615 (7th Cir. 1969) (26 days). *See also Kelco Disposal, Inc. v. Browning-Ferris Industries, Inc.*, 845 F.2d 404 (2d Cir. 1988), *aff'd on other grounds*, ____ U.S. ____, 109 S. Ct. 2909 (1989) (six months); *D&S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*, 692 F.2d 1245, 1248-49 (9th Cir. 1982) (maximum of nine months).

courts shows the inappropriateness of the decision below. The elimination of below-cost pricing analysis by the court below was the only means by which it could find that Rose Acre had not injured competition. Absent total abandonment of all cost-price tests, plaintiffs' evidence would have prevailed under *any* cost-price measure, even the stringent test of consistent and prolonged pricing below average variable cost. Rose Acre sold its eggs below any of the judicially established cost-price standards, and, after the decision below, the federal courts need the direction of this Court as to whether price below *any* measure of cost can now ever be considered evidence of predation.

II.

This Court Should Resolve Whether Eggs And Other Grocery Commodities With A Limited Shelf Life Are Exempt From The Robinson-Patman Act.

The decision below warrants review by this Court because it effectively exempts all commodities with a finite shelf life from being of "like grade and quality" under Section 2(a) of the Robinson-Patman Act, though the goods are physically indistinguishable. (A-23). This analysis reverses the statutory burden of proof under Section 2(a) and thereby reverses the Act's terms and purposes. The Fourth Proviso exception to Section 2(a) for the changing marketability of goods is an affirmative defense to be proved by a defendant as to the condition of particular lots of goods which were sold at lower prices allegedly because they were actually or imminently perishing.[16]

[16] Section 2(a) carves out certain exceptions for pricing activities which, upon proper proof, will not be considered discriminatory. One such exception, the so-called "Fourth Proviso" of the Act,

(Footnote continued on following page)

However, the lower court's treatment of perishability—the potential to perish sometime in the future—as creating a *per se* exception improperly shifts to plaintiff a burden of proving that there were *not* changes in the physical condition of particular lots of goods that were otherwise indistinguishable from identical goods produced and sold simultaneously. Such a clearly erroneous departure from the language of the Robinson-Patman Act, a statute enacted primarily to protect the sale of grocery products, merits review by this Court.

The Seventh Circuit broadens the district court's anomalous ruling that all "the sales made by Rose Acre during the relevant period [were] within the Fourth Proviso of the Robinson-Patman Act" (B-49), *i.e.*, that each egg sale for five years was the result of actual or imminent deterioration. Consequently, both opinions below exclude all eggs (and, by analogy, all goods with a limited shelf life) from the Robinson-Patman Act. The decisions below permit even one-hour old eggs—not to mention Rose Acre's discriminatorily priced "specials" promised to be filled with as-yet-unlaid eggs—to be sold at predatory prices to selected purchasers as a means of lessening competition. Such an all-encompassing exclusion for an entire commodity is contrary to the statutory terms, reason, and legislative history. The Robinson-Patman Act was clearly in-

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[16] *continued*

is that occasional price changes in response to changing market conditions or the marketability of particular goods may not be discriminatory. A circumstance wherein the Fourth Proviso exception may apply is where there is the "actual or imminent deterioration of perishable goods." 15 U.S.C. § 13(a).

tended to apply to the pricing of groceries to wholesalers and retailers.[17]

The Robinson-Patman Act proviso exempts only price changes that occur "from time to time," but Rose Acre regularly and persistently granted special discounts, often *guaranteeing* special prices months in advance of delivery. (Tr. 10/8/87 A.M., 78). Imminent deterioration of eggs played no part in Rose Acre's guaranteed specials. As Rose Acre's Sales Manager, Charles Waltman, testified, "a guaranteed special means that no matter whether we have got any eggs or whether we have to pay a dollar a dozen, we still do this." (Tr. 10/16/87 A.M., 16; PEx. 103 at 104).

Rose Acre produced no evidence that any specific lots of eggs were in danger of imminent deterioration, let alone evidence that for at least five years *all* "specials" were imminently deteriorating. The opinions below silently attempt to avoid this complete failure of proof by reversing the burden of proof and requiring the plaintiffs to prove a negative, *i.e.*, that none of the eggs sold over those years was in danger of imminent deterioration. The Robinson-Patman exemption deals with "situations in connection with *specific lots* of goods":[18] *i.e.*, detailed evidence that those particular goods are imminently threat-

[17] The bill itself, introduced in the House on June 11, 1935 by Rep. Wright Patman, H.R. 8442, 74th Cong., 1st Sess. (1935), was sponsored by the United States Wholesale Grocers Association, see *Hearings on H.R. 4995, H.R. 5062 and H.R. 8442 Before the House Comm. on the Judiciary*, 74th Cong., 1st Sess. 17 (1935), and was drafted by H.B. Teegarden, counsel for the United States Wholesale Grocers Association. H.R. 8442, 74th Cong., 1st Sess. 8232 (1935).

[18] *See Moore v. Mead Service Co.*, 190 F.2d 540, 541 (10th Cir. 1951), *cert. denied*, 342 U.S. 902 (1952) (emphasis added).

ened with spoilage must be shown in order to take advantage of this affirmative defense.[19]

The Seventh Circuit's opinion assumes that the "special" or discriminatory prices resulted from temporary or seasonal imbalances in supply, because "the chickens don't lay to order." (A-22). That simple biological fact cannot obscure the record showing that the years of persistent specially priced sales of millions of eggs to targeted customers were unrelated to any short-term egg-laying. First, the pattern of "specials" by Rose Acre did not reflect any seasonal or temporary variation, but involved huge quantities from 1978 through 1981 and eventually none after this suit was filed. In both 1980 and 1981 "specials" amounted to over 35% of all the eggs sold to the ten targeted customers, 400 or 500% more specials than sold to other customers. (PEx. 30 at ex. B; 95). Second, the quantity of eggs Rose Acre sold to a customer remained the same for weeks, regardless of whether the customer was receiving specials during that period. (Tr. 10/8/87 A.M., 110-11). The "specials" were a means to lure ten customers from plaintiffs; they certainly were not a

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[19] *See Lombino & Sons, Inc. v. Standard Fruit & Steamship Co.*, 1975-2 Trade Cas. (CCH) ¶ 60,527 (S.D.N.Y. 1975) (bananas). *See also In re American Motor Specialties Co.*, 55 F.T.C. 1430, 1447 (1959), *aff'd*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); *In re D&N Auto Parts Co.*, 55 F.T.C. 1279, 1301 (1959) ("the substance of the proviso appears to be that a defense may be made out in occasional and temporary situations"); *In re Fruitvale Canning Co.*, 52 F.T.C. 1504, 1514-15 (1956) (finding the defense not supported, because "it is clear that respondent granted favored buyers the advantage of discriminatory prices as a customary and normal method of business, not in response to any averred changing market conditions"). "The changing conditions proviso" of the Robinson-Patman Act is to deal with "distress merchandise." Scher, *How Sellers Can Live With The Robinson-Patman Act*, 41 Bus. Law. 533, 542 (1986).

way to sell to those favored targeted customers, or to anyone else, temporary surplus or imminently deteriorating eggs. Third, the plaintiffs, like Rose Acre, were obligated to accept and market *all* the eggs as and when laid by the hens. The plaintiffs had to buy "all" the eggs "that a given farmer produced" or be cut off from reliable sources of eggs. (Tr. 10/14/87 A.M., 11). Rose Acre's situation with respect to what hens laid was not unique.

The simple fact a commodity has a finite shelf life is insufficient to remove the commodity's sales from the Robinson-Patman Act, a statute expressly enacted to cover grocery products. Consistent with Judge Easterbrook's abhorrence of the Robinson-Patman Act, the Seventh Circuit shifted the burden of proof on an affirmative, statutory defense (imminent deterioration) so that the exception now consumes the statute. The court below has parlayed the reality that eggs, like all agricultural items, are perishable commodities, into a *per se* exception for perishable goods from the Act. Such a drastic excision should be addressed by this Court.

III.

This Court Should Resolve Whether Price Discrimination Occurs, As A Matter Of Law, When A Seller Grants To Select Customers Persistent Special Discounts That Deviate From The Seller's Uniform Base Prices.

Rose Acre used the same base prices for all customers, and, when it changed those base prices, it changed them for all. As Rose Acre's Director of Marketing explained, the base prices changed only three times in the five-year period, and each time a new pricing letter was sent to *all* customers. (Tr. 10/16/87 A.M., 16-17; PEx. 103 at 9). Those base prices were not long-term commitments but,

instead, were admittedly not "in effect for any particular length of time" and were subject to "modification" at any time. (Tr. 10/6/87 A.M., 146; PEx. 93 at 94). Because each customer paid the same base price, the so-called "specials" were discriminatory prices—being as much as 60-70% of Rose Acre's sales in a given year to some favored customers—not offered to all customers but heavily concentrated on the ten targeted customers. For example, in 1980-1981 the specials represented over 35% of all eggs Rose Acre sold to the small group of ten targeted customers and less than 10% of its sales to all others. (PEx. 95). Thus, the variations in the value of the specials measured the extent of price discrimination among customers.

Rose Acre's business records documented, through hundreds of thousands of transactions, its persistent discriminatory use of specials with respect to the targeted customers. This was analyzed and confirmed by days of expert testimony.

In dismissing the specials as not being proof of different or discriminatory prices, Judge Easterbrook relied not upon the record but upon a hypothetical supposition. He wrote that one might "suppose" as follows:

> *Suppose* in July 1981 Rose Acre offers all of its customers a price 6 [cents] back of Urner Barry for truckload quantities of large eggs, and in January 1982 a discount of 8 [cents] for the same quantities. This is not discrimination but uniformity. But if one supermarket takes the offer in July 1981 *and signs up for a year*, and another takes the offer in January 1982, the prices paid by the two will differ--but without legal price discrimination. No one supposes that a seller must charge the same price on contracts signed at different times, or on long-term contracts and spot sales.

(A-21) (emphasis added). Thus, Judge Easterbrook "supposed" a situation that did not exist and one about which the plaintiffs did not complain. His hypothesis was twice flawed: (1) Rose Acre price letters were not "long term" agreements, such as "a year," but admittedly were subject to "modification" at any time; and (2) the base price did not vary among customers or depend on when a price agreement was made. (Tr. 10/6/87 A.M., 146; PEx. 93 at 94; Tr. 10/16/87 A.M., 16-17; PEx. 103 at 9).

Despite the baseless hypothetical or supposition, the record extensively demonstrated that Rose Acre persistently and discriminatorily departed from its uniform base prices to grant special lower prices to the ten targeted customers and did so with eggs that were indistinguishable from any other eggs Rose Acre sold.[20] No view of the Robinson-Patman Act can justify holding that, as a matter of law, petitioners failed to demonstrate any price differences or discrimination. The Seventh Circuit's radical disregard for the evidence of record mandates review by this Court.

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[20] There was no question before the trial judge or jury in the district court that Rose Acre had committed price discrimination. Even in its decision granting Rose Acre's judgment n.o.v., the district court did not suggest plaintiffs had not established an unrebutted *prima facie* case of price difference. (B-22-27).

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: December 29, 1989

APPENDICES

APPENDIX A

Opinion and Order of the United States Court of Appeals for the Seventh Circuit

In the
United States Court of Appeals
For the Seventh Circuit

No. 88-1426

A.A. POULTRY FARMS, INC., *et al.*,

Plaintiffs-Appellants,

v.

ROSE ACRE FARMS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP 81 446 C—**James E. Noland**, *Judge.*

ARGUED DECEMBER 5, 1988—DECIDED AUGUST 4, 1989

Before BAUER, *Chief Judge*, EASTERBROOK, *Circuit Judge*, and GRANT, *Senior District Judge.**

EASTERBROOK, *Circuit Judge.* Economists frequently give agricultural products such as wheat as examples of perfect competition. Concentration is low and the product fungible. Anyone who tries to charge more than the going price loses sales quickly, making the effort unprofitable. Price closes in on marginal cost and stays there. Sellers may enter or expand output as much as they please, at

* Hon. Robert A. Grant, of the Northern District of Indiana, sitting by designation.

the potential expense of rivals but to the definite benefit of consumers: the growing producer will be able to sell its greater supplies only at the going price or less. Growth by the more efficient producers is an engine of lower prices, to be applauded.

Rose Acre Farms is a vertically integrated egg producer and processor. Rose Acre's chickens practically lay their eggs on conveyor belts, which carry them away to be graded, sorted by size, and crated in a continuous operation. The eggs, in cartons suitable for supermarket shelves, must be sold quickly: "sell 'em or smell 'em" is the industry motto. Hens do not always cooperate by laying eggs in the grades and sizes consumers want at the moment. Unintegrated processors (firms that pack and ship eggs they purchase from farmers, called "producers") cope with this by buying only the grades and sizes they need; integrated firms that are less mechanized than Rose Acre (and firms obliged by contract with producers) sell surplus eggs to "breakers"—firms that use eggs to make bread and other finished products. Rose Acre sells its surplus not to breakers but to supermarkets, at concessionary prices.

"Specials" compete with the eggs offered by other processors. Seven of Rose Acre's rivals filed this suit, contending that the specials were priced too low, in violation of the Robinson-Patman amendments to §2(a) of the Clayton Act, 15 U.S.C. §13(a). Specials go for less than Rose Acre's other eggs, which the plaintiffs portray as price discrimination; the plaintiffs also maintained that Rose Acre sells the "specials" below its cost of production, which they describe as predatory. A jury agreed, returning a verdict of $9.3 million in damages, or $27.9 million after trebling. The district judge granted Rose Acre's motion for judgment notwithstanding the verdict, 683 F. Supp. 680 (S.D. Ind. 1988).

I

Because the jury found a verdict in the processors' favor, we take the facts and inferences in the light most favorable to them.

Rose Acre more than doubled the size of its operation between 1978 and 1982, borrowing $13 million and installing highly automated production facilities. In 1977 Rose Acre had 1.5 million laying hens; by 1982 it had 3.4 million, producing a billion eggs per year. This is approximately 1% of national production. Sales are more concentrated from regional perspectives. In 1978 Rose Acre processed 10.4% of all eggs in Indiana; by 1983 that figure was 23.1%. In a larger region (Ohio, Indiana, Illinois, Iowa, and Michigan), Rose Acre's share rose from 3.4% to 8.6%. In 1978 the four largest processors in Indiana (including Rose Acre) had a share of 20.8%; by 1982 that figure was 60.9%. (The record does not contain enough data to allow computation of the Hirfindahl-Hirschmann Index of concentration, nationally or for any region.)

Although Rose Acre more than doubled in size, national sales of eggs increased about 1% annually. Rose Acre's growth therefore came at other processors' expense. Although until 1978 Rose Acre sold almost all of its eggs within 100 miles of Indianapolis, by 1982 it had cracked markets as far away as Buffalo. To do this it offered low prices. Pricing in the egg business is based on the "Urner Barry index", a daily compendium of egg prices. Processors bid in relation to that scale—e.g., "five cents per dozen back of [= under] Urner Barry"—so that they may strike long-term deals in a fluctuating market. A buyer who receives a bid well under the Urner Barry scale is assured of a relatively good buy even though the delivered price may move up or down with the market.

The plaintiff processors squawked about the prices Rose Acre used to win the business of ten large supermarket chains. Sometimes Rose Acre prevailed on a single, low quote. For example, to wrest the business of the southern division of the Fisher-Fazio chain in Ohio away from plaintiff Gressell Produce Co., Rose Acre offered large eggs at 6¢ per dozen back of Urner Barry if Fisher-Fazio would buy two trailer loads (24,960 dozen eggs per trailer) weekly. More frequently, Rose Acre's prices had two components: ordinary deliveries and a promise of "specials". Rose

Acre got the business of Fisher-Fazio's northern division by offering a "special" price of an extra 4¢ off for one week each month. Boomsma Produce of Missouri, Inc., lost the account of Aldi-Noti in Chicago and St. Louis to Rose Acre's bid of 8¢ per dozen under Urner Barry for large eggs, plus "specials" four weeks per year at an additional 4¢ less than the index; in November 1981 Rose Acre quoted Aldi-Noti a price of 12¢ per dozen below Urner Barry for all trailer loads in excess of five per week, a deal Aldi-Noti could accept only by using Rose Acre's products in both Chicago and St. Louis—which it did, freezing out Boomsma. Deals for other supermarket chains followed a similar pattern. Plaintiffs maintain that Rose Acre did not offer similar discounts in Indianapolis, its home territory, and that the specials tapered off after Rose Acre secured the business of each chain.

Willard F. Mueller, professor of economics at the University of Wisconsin and plaintiffs' expert witness, testified that Rose Acre's pricing strategy started the egg market rolling toward oligopoly and "materially contributed to a declining price structure" in the business. Professor Mueller concluded that the prices were discriminatory because Rose Acre gave proportionally more "specials" to buyers located farther away, although the transportation costs of delivering to those customers were higher. Drawing on the work of an accounting expert, Prof. Mueller also opined that Rose Acre's prices were predatory because they were less than its average total cost, and in 1980 were 2% less than its average variable cost.

Plaintiffs finally offered evidence of predatory intent. David Rust, the president of Rose Acre, once paid a call on Phillip Gressell and said: "We are going to run you out of the egg business. Your days are numbered." Lois Rust, the firm's treasurer, answered "No" to the question "Does your cost of production have anything to do with the selling price of your eggs?" She explained that Rose Acre grants specials to retailers instead of selling

eggs to breakers because "it is the way to win in the long run."

Although this evidence impressed the jury, the district judge granted judgment to Rose Acre. Reversing conclusions he had articulated before and during the trial, the judge held that the evidence of bad intent could not support a verdict that was not otherwise justified by objective economic indicators. That objective information, the judge believed, was "not sufficient to find actual competitive injury in the egg market. . . . Even the most favorable viewing of the evidence in favor of the plaintiffs indicates a healthy, competitive market, marked by the growth of the plaintiffs and the entry and growth of other egg processors". 683 F. Supp. at 687. Evidence that plaintiff Hemmelgarn & Sons, Inc., had grown as fast as Rose Acre particularly impressed the judge, as did the fact that the gross revenues of the plaintiffs increased from $60 million in 1977 to $92 million in 1983. Entry from other firms also was impressive:

> Companies located in the areas in which Rose Acre sold its eggs which entered the market or expanded significantly include Wabash Valley Produce which grew from 2 million to 3.3 million layers; Midwest Poultry Services which grew from under 1 million to 2.25 million layers by 1983; Croton Egg Farm entered the market and grew to 2.8 million layers by 1983; Daylay Egg Farm also entered the market and grew to 1.2 million layers by 1983. Additionally, Creighton Brothers and Weaver Brothers, both located in Indiana, expanded operations and grew during this period of time.

Ibid. Plaintiffs contest the district court's emphasis on the growth of their revenues, pointing out that market prices drive revenues. They offer this table:

Percent Change in Cases of Eggs Sold

(1978-1982)

Rose Acre	217.0%
Mendelson Egg	-3.4%
Boomsma Produce	7.0%
Peter Produce	3.0%
Hemmelgarn & Sons	62.0%
A.A. Poultry Farms	-14.0%
Gressel Produce	1.5%

To which they add: "Given the inelastic demand for eggs and Rose Acre's dramatic expansion, the plaintiffs are the fortunate survivors."

After concluding that the egg market is competitive, the district court observed that the evidence could not support an inference of predatory intent—not only because of the vigorous competition but also because the evidence did not show that Rose Acre sold eggs for less than the appropriate measure of costs, 683 F. Supp. at 688-89. When denying summary judgment the district court had said that prices below long-run variable costs could be predatory; now it held that the plaintiffs had not produced acceptable evidence to establish what Rose Acre's long-run incremental cost was, rendering Prof. Mueller's conclusions speculative. 683 F. Supp. at 689-91. That led straight to judgment for Rose Acre.

II

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, makes it unlawful "to discriminate in price between different purchasers of commodities of like grade and quality", unless certain exclusions and defenses apply, "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly". When the discrimination has primary-line effects—that is, in the same industry as the person granting the discriminatory prices—the claim has much in common with a contention that the defendant engaged in

predatory pricing in violation of §2 of the Sherman Act, 15 U.S.C. §2. In either case, the gravamen is that the aggressor sold goods for too little money, hoping to cripple or discipline rivals so that it might sell its wares for a monopoly price later, recouping the losses and adding a hefty profit, to the detriment of consumers. Under a system of notice pleading, a party may prevail by establishing that its legal rights have been violated, whether or not it names the right statute. Because this case was litigated as if the complaint had named §2 of the Sherman Act in addition to §2(a) of the Clayton Act, and the appeal has been briefed from the same perspective, we start with the question whether the plaintiffs succeed under the Sherman Act's standard.

Consumers, for whose benefit the antitrust laws are designed, welcome low prices but not monopoly prices. Contentions that firms practice predatory pricing—the sequence low-price-now-high-price-later—accordingly create difficult problems for courts. If a rival files suit during the "low price" period, how can a court tell whether the price is low because the defendant is an efficient producer driving down costs (or just driving price down to cost) as opposed to a predator? A price "too low" for an inefficient rival may be just right from consumers' perspective, showing only that the defendant's costs of production are lower than those of the plaintiff—for which it should receive a reward in the market rather than a penalty in the courthouse. So the plaintiff's observation that it is losing business to a rival that has slashed prices is consistent with both aggressive competition and predatory pricing. How to tell them apart?

One way is to find out whether the defendant's prices exceed its costs. If the price exceeds cost, then it reflects beneficial aggressive competition. If the price is less than cost, then it may reflect a sacrifice in the hope of suppressing competition and collecting a monopoly profit later. Much of the recent academic writing on predatory pricing tackles the subject from this perspective, and many recent cases in and out of this circuit struggle with

the appropriate price-cost relation. *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 431-32 (7th Cir. 1980); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1114-23 (7th Cir. 1983); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); Frederic M. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977).

Trying to infer (or refute) predatory conduct from the relation between price and cost is difficult business. Often a price below cost reflects only the sacrifice necessary to establish a presence in a competitive market (for example, new magazines lose money for years as they try to increase circulation and attract advertising revenue, without creating the tiniest risk of monopoly), or it could reflect the obsolescence of the product and the fact that a firm planning to leave the market does not try to cover its fully-allocated costs. See, e.g., *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48 (2d Cir. 1979) (Friendly, J.) (promotional discount); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir. 1977) (sales below average total cost in declining industry). Measuring costs creates additional problems. Are advertising and research costs expensed or capitalized? How does one allocate the cost of activities that have joint products? Agencies engaged in ratemaking struggle with these problems for years, even decades, without producing clear answers. If we could measure costs, what would be the right benchmark? Short-run variable cost? Long-run variable cost? Average total cost? Any of these (and there are more measures) might be best in a given case, depending on the strategy the aggressor has selected and the length of time it will take to succeed. Efforts to measure Rose Acre's cost of production and contrast it with price made this a complex case.

A second approach to separating aggressive competition from predation concentrates on the defendant's intent. If

a seller plans to drive out competition by fowl means, then the court infers that its price is unlawfully low now and will be too high later. Frequently courts use intent to resolve ambiguities in interpreting price-cost data; sometimes, though, courts assume that bad intent is unlawful and use price-cost data to infer it, e.g., *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1496 (11th Cir. 1988). "Some courts almost seem to overlook the fact that predatory pricing is the evil, and write sometimes as if the conduct is important only because it is evidence of the firm's evil intent." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶714.2b n.5 (1988 Supp.). Still other courts have held that intent is irrelevant in predatory pricing cases, e.g., *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983). We shall return to intent.

The third approach looks at the back end, the "high price later" part of the predatory sequence. Predatory prices are an investment in a future monopoly, a sacrifice of today's profits for tomorrow's. The investment must be recouped. If a monopoly price later is impossible, then the sequence is unprofitable and we may infer that the low price now is not predatory. More importantly, if there can be no "later" in which recoupment could occur, then the consumer is an unambiguous beneficiary even if the current price is less than the cost of production. Price less than cost today, followed by the competitive price tomorrow, bestows a gift on consumers. Because antitrust laws are designed for the benefit of consumers, not competitors, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399-400 (7th Cir. 1989), a gift of this kind is not actionable.

Contemporary cases strongly favor using this third approach whenever possible. The two most recent predatory pricing cases in the Supreme Court, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), employ it, each holding that recoupment would

be so unlikely that antitrust inquiry could not be justified. So too with our own most recent decision on point, *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989). See also Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979), recommending the use of this filter. It is much easier to determine from the structure of the market that recoupment is improbable than it is to find the cost a particular producer experiences in the short, middle, or long run (whichever proves pertinent). Market structure offers a way to cut the inquiry off at the pass, to avoid the imponderable questions that have made antitrust cases among the most drawn-out and expensive types of litigation. Only if market structure makes recoupment feasible need a court inquire into the relation between price and cost.

Making likelihood of recoupment the initial hurdle avoids not only questions of cost but also questions of intent, for if a price below cost is lawful when it cannot lead to monopoly, then the defendant's state of mind becomes irrelevant. Sacrificing profits today benefits consumers; that the defendant *knows* it is sacrificing profits does not reduce this benefit. Suppose we assume that every sacrifice of profit (meaning, roughly, sales below cost) is an attempt to engage in predatory pricing. If the attempt fails, consumers are better off, and the aggressor suffers an automatic penalty. It surrenders the profits it could have made by charging the higher market price. Because unsuccessful predation is unprofitable, it is bootless for the legal system to intervene, see *Matsushita*, 475 U.S. at 595; self-deterring conduct is not apt to be repeated, and if it is the consumer will receive still another boon. Reference to intent could not help the court determine whether recoupment is possible, and unless recoupment lies in store even the most vicious intent is harmless to the competitive system.

Several other compelling reasons support the conclusion that intent plays no useful role in this kind of litigation. Firms "intend" to do all the business they can, to crush

their rivals if they can. " '[I]ntent to harm' without more offers too vague a standard in a world where executives may think no further than 'Let's get more business,' " *Barry Wright*, 724 F.2d at 232. Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business. Few firms cut price unaware of what they are doing; price reductions are carried out in pursuit of sales, at others' expense. Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. You cannot be a sensible business executive without understanding the link among prices, your firm's success, and other firms' distress. If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden "intent", they run the risk of penalizing the motive forces of competition. *Indiana Grocery*, 864 F.2d at 1413; *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986).

Almost all evidence bearing on "intent" tends to show both greed-driven desire to succeed and glee at a rival's predicament. Take, for example, the statement David Rust made to Phillip Gressell: "We are going to run you out of the egg business. Your days are numbered." Undoubtedly Rust wanted to leave Gressell scratching in the dust, but drive to succeed lies at the core of a rivalrous economy. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition. Or take Lois Rust's statement that Rose Acre's prices were unrelated to its costs. Plaintiffs treat this as a smoking gun. Far from it, such a statement reveals Rose Acre to be a price taker. In perfect competition, firms must sell at the going price, no matter what their own costs are. High costs do not translate to the ability to collect a high price; someone else will sell for less. Monopolists set price by reference to their costs (to be precise, they set quantity where marginal cost equals marginal revenue, a measure reflecting the shape

of the market's demand curve, and charge the price the market will bear at that quantity); competitors set price by reference to the market. A predator, too, is highly sensitive to its costs of doing business; it calculates how much sacrifice it needs to make (and could bear), and uses that as the basis of its prices. So the statement that Rose Acre does not pay attention to its own costs when setting price reveals that the firm was acting as a competitor rather than a monopolist. Yet statements of this sort readily may be misunderstood by lawyers and jurors, whose expertise lies in fields other than economics.

Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. It also complicates litigation. Lawyers rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury. Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation. Although reference to intent *in principle* could help disambiguate bits of economic evidence in rare cases, *MCI v. AT&T*, 708 F.2d at 1123 n.59, the cost (in money and error) of searching for these rare cases is too high—in large measure because the evidence offered to prove intent will be even more ambiguous than the economic data it seeks to illuminate. Professors Areeda and Hovenkamp therefore suggest that intent be removed as a subject in predatory pricing cases, see Phillip E. Areeda, 7 *Antitrust Law* ¶1506 (1986); Areeda & Hovenkamp, *Antitrust Law* ¶714.2 (1988 Supp.), and we are persuaded that this is the right approach. None of our earlier predatory-pricing cases founds liability on the basis of intent, so the subject is open to full consideration. We have previously removed intent as a basis of liability in other parts of antitrust law, e.g., *Schachar*, 870 F.2d at 400 (intent without effect may not be the basis of liability in a §1 case); *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*,

797 F.2d 370, 379-80 (7th Cir. 1986) (liability under §2 for abuse of monopoly power stems from anti-competitive effects and not intent); *Ball Memorial*, 784 F.2d at 1338-40. Following the First Circuit's decision in *Barry Wright*, we now hold that intent is not a basis of liability (or a ground for inferring the existence of such a basis) in a predatory pricing case under the Sherman Act. We respectfully disagree with the Eleventh Circuit's opinion in *McGahee* and occasional, similar, decisions elsewhere, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027-28 (9th Cir. 1981).

Rose Acre could not have recouped a predatory investment in the egg business. Plaintiffs' economic expert witness testified that prices were falling, and as in *Matsushita* could not have been expected to rise—at least not because of what Rose Acre did. Throughout 1978-82, other firms were entering the business or expanding as fast as Rose Acre. "The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Matsushita*, 475 U.S. at 589 (emphasis in original). An expanding firm in a stagnant market inevitably puts downward pressure on prices, the opposite of the concern underlying the Sherman Act. Persistent entry and expansion by other firms at the same time ensures that recoupment cannot occur. Monopoly pricing comes from reductions in output, as consumers bid for the remaining supply. *NCAA v. University of Oklahoma*, 468 U.S. 85, 103-08 (1984); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979); *Indiana Grocery*, 864 F.2d at 1413-14; *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc.*, 814 F.2d 358, 368-71 (7th Cir. 1987). Try as it might, Rose Acre did nothing to stem the inflow of productive capacity. Even the plaintiffs grew, at an average rate exceeding the national market's 1% per annum.

Market structure, too, made recoupment impossible. Egg production is unconcentrated. Egg processing is a little more so, but Rose Acre's 1% share on a national basis

hardly gave it the power to raise price. Plaintiffs observe that the four-firm concentration ratio in Indiana was about 64% in 1983, but Indiana is not a relevant market. We know that Rose Acre sold eggs in Buffalo, more than 500 miles away, and that Boomsma, with its principal facilities in Iowa, sold in Ohio. Any given customer apparently could turn to processors within 500 miles as sources of supply. "A market is the set of sellers to which a set of buyers can turn for supplies at existing or slightly higher prices." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989). Concentration therefore should be measured from customers' perspectives, to find out whether one firm's reduction in output would induce the customer to pay more. Boeing may be the only manufacturer of airframes in Renton, Washington, and IBM the only manufacturer of computers in Armonk, New York, but a customer in either place would not face a monopolist. Plaintiffs did not compute the concentration or HHI ratios from any customer's point of view. Every indication in the record, though, suggests that each of the ten supermarket chains had and has ample potential sources of supply. Cases frequently say that as a matter of law single-firm shares of 30% or less cannot establish market power. E.g., *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 26 (1984); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612-13 (1953); *United States v. Alcoa*, 148 F.2d 416, 424 (2d Cir. 1945) (one-third insufficient; dictum); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) (one-third insufficient). Cf. *Ball Memorial Hospital*, 784 F.2d at 1334-37 (even shares exceeding two-thirds do not confer power over price if entry is easy). None of the customers was facing a seller with close to a third of the market, and none faced a serious prospect of monopoly prices tomorrow in exchange for cheap eggs today.

Plaintiffs hint darkly that after Rose Acre secured a new supermarket chain, it cut back on the number of "specials" offered, thus raising price. So long as the plaintiffs and other processors continue operating, however,

any attempt by Rose Acre to raise price creates fresh opportunities for its rivals—and for the other firms that have been flocking to the business. Supermarkets seem happy with Rose Acre; none filed suit or testified on behalf of the plaintiffs. As we emphasized in *Indiana Grocery* and *Ball Memorial Hospital*, courts should treat with great skepticism complaints by competitors who are injured by the low prices that customers adore, when the customers are content. Our review of the record leads us to agree with the district court that no rational jury could have found that recoupment took place, could have taken place, or conceivably could take place in the future. To the contrary, the overwhelming impression left by this record is that Rose Acre beat its rivals to the punch in automating production and used its lower costs to take business away from them. New entrants with modern technology have flourished; stodgy firms have stagnated. This is what competition is all about, and to penalize it in the name of antitrust would do a great disservice to consumers.

III

To conclude that Rose Acre did not engage in predatory pricing is not necessarily to absolve it under the Robinson-Patman Act. Despite the language of that statute, penalizing primary-line discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly", the Supreme Court held in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), that price discrimination in an oligopolistic market contributing to the erosion of price levels may violate the statute. Scholars have cogently argued that *Utah Pie* employed the Robinson-Patman Act to condemn the process by which competition creeps into oligopolistic markets and undercuts excessive prices. See, e.g., Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 12-15, 38 (1976); Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 Yale L.J. 70 (1967). Cf. United States Department of Justice, *Report on the Robinson-*

Patman Act (1977) (expressing doubt about the benefits of the Robinson-Patman Act as a whole); Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & Econ. 427 (1978) (tracing the demise of Utah Pie Co. despite shelter from competition).

Nary a voice has been heard in support of *Utah Pie* in years. The universal academic disdain for that case, coupled with the lack of recent reaffirmation by the Supreme Court, has led several courts of appeals to conclude that the standard of primary-line liability under the Robinson-Patman Act should be the same as that under §2 of the Sherman Act, e.g., *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1345 (8th Cir. 1987); *D.E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1439 (6th Cir. 1983); *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), a conclusion professors Areeda, Turner, and Hovenkamp endorse. See Phillip Areeda & Donald F. Turner, 3 *Antitrust Law* ¶720c (1978); Areeda & Hovenkamp at ¶720' (collecting cases at p. 573 n.1). Courts and commentators give a reason and an excuse. The reason is that if judges employ the best feasible test for predatory pricing in §2 cases, it is mischievous to use a different (necessarily inferior) test under the Robinson-Patman Act. (If the courts don't use the right approach under the Sherman Act, this approach continues, then they should devise a better one rather than use different tests under different statutes). The excuse is that the Robinson-Patman Act prohibits only price discrimination that "may . . . substantially . . . lessen competition or tend to create a monopoly", which under modern cases refers to consumers' welfare, not producers' comfort. An excuse it is, however, because *Utah Pie* took a different view of things.

Widespread civil disobedience in the judiciary in response to *Utah Pie* parallels the response to *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), another almost friend-less antitrust decision from the same Term of Court. The substantial ingenuity devoted to getting 'round *Schwinn* was one of the factors contributing to its

demise. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 48 n.14 (1977) (overruling *Schwinn*). Although *Schwinn* bit the dust, the Court has yet to revisit *Utah Pie*. One could say that in the intervening years the Supreme Court has repeatedly said that, whenever possible, standards under the Robinson-Patman Act should be conformed to standards under other antitrust laws. E.g., *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 & n.13 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 457-59 (1978). For the reasons we canvassed in Part II of this opinion, "ordinary" antitrust standards suggest giving Rose Acre a medal rather than requiring it to pay $28 million in damages, which exceeds its net worth. But there is a difference between an interpretive approach, a means of resolving ambiguities ("When in doubt, read the Robinson-Patman Act to protect consumers' rather than producers' welfare"), and authorization to disregard cases that have laid down rules. No case since *Utah Pie* questions its *holding*, as opposed to its outlook. Inferior federal courts, in order to provide equal justice under law, must apply the holdings of cases still on the books. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1921-22 (1989); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983). Sometimes the imminent demise of a precedent may be plain, as when it rests wholly on an opinion since overruled, and in such cases an inferior court may apply today's law sure that the empty shell will break under the slightest pressure. E.g., *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984); *United States v. Burke*, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985); *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354, 357-61 (7th Cir. 1983) (en banc); *Norris v. United States*, 687 F.2d 899, 902-03 (7th Cir. 1982). When the case stands unquestioned, however, a belief that the Court would not reach the same decision today if the question were open anew is not a basis for disregarding the law on the books.

Separating a case that is dead but unburied from a case that is living on borrowed time is hard yet important.

Many's the time the Supreme Court says, using one formula or another: "We might not adopt this interpretation today, but we will not overrule it either." Antitrust law has its share. E.g., *Flood v. Kuhn*, 407 U.S. 258 (1972) (reaffirming two earlier holdings that baseball is not "interstate commerce" and so is not covered by the antitrust laws); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) (declining to discard the 40-year-old "filed rate doctrine"). At the same time, antitrust doctrines equal in pedigree and antiquity have been jettisoned. E.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (overruling the 40-year-old intercorporate conspiracy doctrine); *Sylvania* (overruling *Schwinn*). It is presumptuous—more, it produces uncertain and unequal application of the law—for an inferior court to act on a belief that a given decision will be among the handful that the Supreme Court overrules or significantly limits.

A court could of course "reconcile" the Robinson-Patman and Sherman Acts the way the Eleventh Circuit recently did, holding in *McGahee*, 858 F.2d at 1493 n.9, that the two have the same meaning and then conforming the Sherman Act's standard to that of the Robinson-Patman Act, *id.* at 1496-1501. That approach, however, drives the definition of predatory pricing under the Sherman Act away from *Matsushita* and *Cargill* just as surely as the other kind of reconciliation slights *Utah Pie*. Sherman Act cases should be approached as we have done in Part II; Robinson-Patman cases, for now at least, follow the approach of *Utah Pie*.

Utah Pie holds that the Robinson-Patman Act condemns at least some primary-line price discrimination that the Sherman Act permits. Just as we may not properly inter that case, so we ought not give it a crabbed reading in order to heave out the rear door what we welcomed in the front. The frozen pie market, the subject of *Utah Pie*, was more concentrated than the egg business, but it would be unprincipled to say that the level of concentration in *Utah Pie* is the lowest sufficient under the Rob-

inson-Patman Act, especially when the Court described the frozen pie market as "highly competitive", 386 U.S. at 703. Moreover, *Utah Pie*, like other Robinson-Patman cases before it, recited that "predatory intent" coupled with "unreasonably low prices" may be the basis of liability, 386 U.S. at 696 n.12 (citing cases), so our conclusion that resort to intent under §2 of the Sherman Act creates substantial prospect of injury to competition and needlessly complicates litigation does not support a judgment *in this court* taking intent outside the pale of Robinson-Patman litigation. *Utah Pie* held that the firm taking the lead in reducing prices may be liable on account of a "drastically declining price structure" in a "highly competitive" market. 386 U.S. at 703. Antithetical as the notion of liability for vigorous competition leading to low prices is to contemporary antitrust policy, our job is application.

The egg market is highly competitive, and the jury could have believed that Rose Acre's pricing contributed to a declining price structure, causing its rivals injury (lost sales) as a result. The evidence of "intent" in this case does not differ in kind from the sort in other Robinson-Patman cases: it shows that the defendant wanted to grab as much business as it could and was not picky about how. *Utah Pie* said that "actual intent to injure another competitor", 386 U.S. at 702-03 n.14, would suffice, without remarking on the fact that intent to do all the business you can and intent to take business away from, even crush, rivals are two sides of the same coin. Although a few references in *Utah Pie*, e.g., 386 U.S. at 701; cf. *Matsushita*, 475 U.S. at 584-85 n.8, imply that the relation between price and cost matters, the Court had in mind a measure of average total cost rather than of variable or marginal costs, 386 U.S. at 698 (referring to direct cost plus allocated overhead), and the jury in this case would have been entitled to conclude that Rose Acre sold some of its eggs, some of the time, for less than average total cost.

This drives us almost to the point of reversing the district court—almost, but not quite. An enduringly com-

petitive structure might offer Rose Acre safe harbor, see *Dean Milk Co. v. FTC*, 395 F.2d 696 (7th Cir. 1968). We needn't say because one more ingredient is missing: price *discrimination*, as the Robinson-Patman Act uses that term. Without it plaintiffs' case won't fly, as they lose a standard predatory pricing claim for reasons we have covered.

Section 2(a) says "price discrimination" but means "price difference". *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). Economic (as opposed to legal) price discrimination occurs when a firm sells products at different price-cost ratios. George J. Stigler, *The Theory of Price* 210 & n.13 (4th ed. 1987). A seller that charges all of its customers the same price probably is engaged in economic price discrimination, because the costs of supplying the goods vary with distance. So if Rose Acre charged customers in Indianapolis and Buffalo the same price, it was discriminating in favor of the supermarket in Buffalo by absorbing freight. But under the Robinson-Patman Act, a firm is entitled to charge the same price to everyone even though its costs differ. Indeed, price differences that follow cost differences are treated as (legal) price discrimination and must be justified, see the first proviso to §2(a). This puts a big hole in plaintiffs' case, because Professor Mueller testified that Rose Acre engaged in three kinds of price discrimination, of which the first was charging the same price to customers in different cities. Economic price discrimination this undoubtedly was; legal price discrimination it just as surely was not. Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* 87-99 (1962).

Dr. Mueller testified that Rose Acre engaged in two other kinds of price discrimination: it gave different numbers of "specials" to different customers, and it charged different prices (meaning different discounts off the Urner Barry index) to different customers. Both of these propositions are superficially true. Recall the evidence about sales to Fisher-Fazio and Aldi-Noti. Rose Acre offered these two chains different numbers of specials per year and dif-

ferent discounts off the Urner Barry index. Complications set in, though, once we introduce two other features: timing and net prices.

Start with timing. Suppose in July 1981 Rose Acre offers all of its customers a price 6¢ back of Urner Barry for truckload quantities of large eggs, and in January 1982 a discount of 8¢ for the same quantities. This is not discrimination but uniformity. But if one supermarket takes the offer in July 1981 and signs up for a year, and another takes the offer in January 1982, the prices paid by the two will differ—but without legal price discrimination. No one supposes that a seller must charge the same price on contracts signed at different times, or on long-term contracts and spot sales. See Rowe, *Price Discrimination Under the Robinson-Patman Act* at 50. Whether Rose Acre engaged in price discrimination as the Robinson-Patman Act uses that term depends on whether it charged the same price to customers at the same time. *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 806 (9th Cir. 1969). Prof. Mueller did not address that question. The only evidence we could find on the subject suggested that at any given moment Rose Acre was offering the same terms to anyone who then signed on as a customer.

Next consider the computation of the price each customer paid. Plaintiffs, through Dr. Mueller, maintained that the *principal* kind of discrimination was between Rose Acre's regular prices and its "specials". One week Rose Acre would sell large eggs for 6¢ back of Urner Barry, and the next week for 10¢ under the index. Most of Mueller's time on the stand was devoted to detailing differences in the number of weeks for which different customers were eligible for "specials".

No case of which we are aware holds, however, that fluctuations over time to the same customer are "price discrimination" within the meaning of the Robinson-Patman Act. Consider two contracts: Rose Acre agrees to sell the first supermarket 100% of its needs for 8¢ under Urner Barry, and the second supermarket 67% of its requirements for 6¢ under Urner Barry and the other 33%

for 12¢ back of the index. Plaintiffs, through Dr. Mueller, treat this as price discrimination twice over: first the base prices differ, and then the number of "specials" differs. Yet the two supermarkets are getting the identical price: 8¢ under the index for 100% of their eggs. Selling a chain 100% of its requirements at 80¢/dozen is the same as furnishing 80% of the requirements at $1.00/dozen and giving it the other 20% for "free". Whether price discrimination has occurred depends, therefore, on the price *after* all discounts, specials, and so on. See *Fruitvale Canning Co.*, 52 F.T.C. 1504, 1520 (1956); Julian O. von Kalinowski, 4 *Antitrust Laws and Trade Regulation* §27.03[2] (1988 ed.) (collecting sources).

Asked at trial whether he had computed the mean price paid by customers after blending in the specials, Dr. Mueller said no. He computed the percentage of eggs sold to a given customer at any kind of "special" price, but not the blended price paid. Asked at oral argument whether it would be possible to whip up the blended price from the record, counsel for the plaintiffs said only that Rose Acre's pricing information was there—in carton upon carton full of forms. Plaintiffs did not try to use this information; the jury did not have it; we could not derive it without Herculean labors.

Especially not when §2(a) reaches only discrimination in the price of goods of "like grade and quality". "Specials" were not necessarily the same grade and quality as Rose Acre's other sales. Integrated producer-processors have a problem that other processors do not necessarily face: the chickens don't lay to order. Marcus Rust, another of the family members responsible for running Rose Acre, testified without contradiction that "we could not control the size of the eggs that the chickens laid. . . . When you are on an in-line operation you get what the chicken produces." What customers want at the moment may be something else again. Rose Acres crates the eggs almost as soon as they are laid, then stores them in coolers 'til customers want that size and grade. If too much of one size and grade accumulates, Rose Acre could sell to "breakers"

only by taking the eggs out of the cartons, at extra cost, and shipping in bulk. The alternative is to sell at special prices. Rose Acre "guaranteed" specials to customers, but it chose the timing of the specials and the eggs delivered, with an eye to reducing its overstock. Although "special" eggs as delivered may be physically indistinguishable to the buyer, they are not fundamentally the same good, for the same reason a seat on the 6:00 a.m. flight from Chicago to New York is not the same as a seat on the 5:00 p.m. flight, and a seat on the 5:00 p.m. flight reserved two weeks in advance is not the same as a seat on that flight for which the passenger had to stand by. Professor Mueller needed to account for the fact that some, perhaps most, of the specials were not "like" eggs sold on long-term contract; he did not.

Proving price discrimination was plaintiffs' burden, yet they introduced only poultry evidence. The closest they came was in Exhibit 61, which summarizes differences in the value of the discounts different customers received—and fails because it does not take into account differences in the base price from which the discounts were calculated. Exhibits (such as 52-8-C) that average prices to given customers over a year ignore the specials; the few efforts to compute average benefits of specials disregard the base prices (and the fact that the base contracts may have been entered into at different times). Professor Mueller conceded on cross-examination that the average discount given to any of the ten chains about which plaintiffs are concerned departed by no more than 0.8% from the average discount to Rose Acre's customers as a group, so small variations in the base price easily could wipe out the differences.

We recognize that Rose Acre did not keep its records in a way that conduces to finding average delivered prices, and that putting together the necessary information would have required a great deal of work. Yet given the formidable advantages a plaintiff enjoys under the Robinson-Patman Act once it shows price discrimination, we are not disposed to allow it to stint on the demonstration. For

all we can tell—for all the jury could have told—Rose Acre offered uniform blended prices to customers at any particular time for like-quality goods. Plaintiffs failed to prove an essential element of their case, and the judgment is therefore

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 4, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge*

A. A. POULTRY FARMS, INC., et al.,

Plaintiffs-Appellants,

No. 88-1426 vs.

ROSE ACRE FARMS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 81-C-446—**James E. Noland,** *Judge.*

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* Honorable Robert A. Grant, of the Northern District of Indiana, sitting by designation.

APPENDIX B

Opinion and Order of the United States District Court for the Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.A. POULTRY FARMS, INC., BOOMSMA PRODUCE, INC., GRESSEL PRODUCE CO., INC. HEMMELGARN & SONS, INC., MENDELSON EGG COMPANY, PETER PRODUCE, INC., and BOOMSMA PRODUCE OF MISSOURI, INC.	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 81-466-C
ROSE ACRE FARMS, INC.,	)	
Defendant.	)	

JUDGMENT

This cause is before the Court on the defendant Rose Acre's motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

The Court, being duly advised in the premises and having granted the defendant Rose Acre's motion for judgment

notwithstanding the verdict by entry dated December 28, 1987 and finding no just reason for delay, hereby enters judgment for the defendant Rose Acre Farms, Inc. and against the plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the plaintiffs take nothing by way of their complaint, that JUDGMENT be entered herein in favor of the defendant and that costs be borne accordingly.

DATED this 3rd day of February, 1988.

James E. Noland
U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.A. POULTRY FARMS, INC., BOOMSMA PRODUCE, INC., GRESSEL PRODUCE CO., INC. HEMMELGARN & SONS, INC., MENDELSON EGG COMPANY, PETER PRODUCE, INC., and BOOMSMA PRODUCE OF MISSOURI, INC.	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 81-466-C
ROSE ACRE FARMS, INC.,	)	
Defendant.	)	

ORDER

This cause is before the Court upon the plaintiffs' motion for summary judgment on the defendant's amended counterclaim filed October 29, 1987 and pursuant to the Court's Entry of December 28, 1987 granting the defendant's motion for judgment notwithstanding the verdict and in the

alternative granting the defendant's motion for a new trial.

Whereupon the Court, having considered the motion, the memoranda in support thereof and in opposition thereto, the entry of December 28, 1987 and being duly advised in the premises now finds as follows:

1. The plaintiffs' motion should be, and hereby is, DENIED; and

2. Pursuant to Fed. R. Civ. P. 54(b), there is no just reason for delay in the entry of judgment in favor of the defendant and the Court therefore directs the entry of such judgment.

IT IS SO ORDERED.

DATED this 3rd day of February, 1988.

James E. Noland
U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.A. POULTRY FARMS, INC., BOOMSMA PRODUCE, INC., GRESSEL PRODUCE CO., INC. HEMMELGARN & SONS, INC., MENDELSON EGG COMPANY, PETER PRODUCE, INC., and BOOMSMA PRODUCE OF MISSOURI, INC.	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 81-466-C
ROSE ACRE FARMS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

The plaintiffs brought this anti-trust action against the defendant Rose Acre Farms, Inc. ("Rose Acre") alleging that Rose Acre violated Section 2(a) of the Clayton Act of 1914, as amended by the Robinson-Patman Act of 1936, 15 U.S.C. § 13 (1982) by engaging in illegal price discrimination or "predatory

pricing." This cause was tried to a jury from October 5, 1987 through October 23, 1987. The jury returned a verdict in favor of the plaintiffs and assessed actual damages against Rose Acre in the amount of $9,285,634.00 which amount would be trebled pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982).[1] Rose Acre has moved for judgment notwithstanding the verdict pursuant to Rule 50(b), Federal Rules of Civil

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[1] Section 4 of the Clayton Act provides in part:

> . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1982).

Procedure and, in the alternative, a new trial pursuant to Rule 59, Federal Rules of Civil Procedure. The plaintiffs have moved for Judgment on Rose Acre's counterclaim which counterclaim alleges that the plaintiffs' complaint is groundless and unfounded and the entire litigation, therefore, a sham. By entry dated December 28, 1987 the Court set aside the jury verdict in favor of the plaintiffs and granted Rose Acre's motion for judgment notwithstanding the verdict and alternatively its motion for a new trial. This memorandum opinion is filed to accompany that entry and also to direct the entry of judgment in favor of the defendant Rose Acre. Because the Court has determined that the entry of judgment in favor of Rose Acre is appropriate and that alternatively a new trial is mandated, the Court must now

also deny the plaintiffs' motion for judgment on the amended counterclaim.

I. FACTUAL BACKGROUND

The plaintiffs who brought this action are all egg processors located in the midwestern United States who sell shell eggs to retailers, wholesalers and market facilitators in the midwest. The plaintiff A.A. Poultry Farms, Inc. (A.A. Poultry) is located in West Unity Ohio and sells eggs to customers in New York and Pennsylvania among other places. The plaintiff Boomsma Produce, Inc. (Boomsma) is located in Pella, Iowa and sells eggs to customers in, among other places, Illinois and Indiana. The plaintiff Gressel Produce Co., Inc. (Gressel) is located in Delphos, Ohio and sells eggs to customers in Ohio and other places. The plaintiff Hemmelgarn & Sons, Inc. (Hemmelgarn) is located in Coldwater,

Ohio and sells eggs, among other places, to customers located in New York, Ohio and Michigan. The plaintiff Mendelson Egg Company (Mendelson) is located in West Unity Ohio and sells eggs in Michigan, among other places. The plaintiff Peter Produce, Inc. is located in Lime Springs, Iowa, and sells eggs in, among other places, Illinois, Indiana and Michigan. The plaintiff Boomsma Produce of Missouri, Inc. (Boomsma Missouri) has its principal place of business at Pella, Iowa and sells eggs in, among other places, Illinois and Missouri. The plaintiffs compete with the defendant Rose Acre and with each other to sell eggs to customers located in the states mentioned above and in other states.

Generally, an egg processor is a participant in the egg industry who prepares eggs for sale to retailers or

wholesalers before their sale to the consumer. Processors purchase eggs directly from egg producers and then clean, carton, and grade the eggs. The egg producers from whom the processors purchase eggs are for the most part small independent farmers who raise live, egg-laying hens ("layers") and then sell the eggs to the processors. The plaintiffs in this action are all egg processors who purchase the eggs from producers and then resell them to wholesalers, retailers or market facilitators.[2]

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[2] Market facilitators represent an alternative, ancillary market that provides an outlet for eggs that are not disposable along traditional selling lines. This group includes egg breakers which are egg product factories that actually use ("break") the egg to produce other goods; egg clearing houses which match suppliers and customers in other geographic markets; and egg exporters who sell the eggs in the international market. Generally, egg breakers represent the least attractive alternative to the processors as their prices are customarily lower. As a

The defendant Rose Acre is an integrated producer and processor of eggs. As an integrated producer and processor of eggs, Rose Acre maintains and raises its own layers to produce the eggs which it then processes at the same location and sells to wholesalers, retailers or market facilitators. The integrated producer and processor enjoys certain benefits of efficiency from producing and processing eggs at a single location which are not available to the plaintiffs who purchase eggs elsewhere for processing.

The prices obtained by an egg processor for its eggs from its customers is dependent on the supply and demand for eggs in his area. The eggs themselves

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result, producers do not normally sell their eggs to the breakers unless such producer possesses a surplus or excess supply which would otherwise be perishable.

come in different sizes (i.e., pee wee, small, medium, large, ex-large and jumbo) and grades (i.e., A or AA), with each combination of grade and size having an individual supply and demand. The layers themselves lay a combination of sizes of eggs and the producer cannot control what sizes of eggs are actually produced. Moreover, eggs are a perishable commodity. Because eggs have an indefinite shelf life, the age of the egg affects its price. Thus, processors may be forced to sell eggs at lesser prices or to "breakers" in order to sell them before they are too old or they expire. Each carton of eggs is stamped with a freshness or expiration date which ranges from two weeks to 30 days from the date the egg is laid.[3]

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[3] Marcus Rust testified that Marsh Supermarkets requests a freshness or expiration date of two weeks from the

The actual pricing of eggs in the industry is done by formula pricing. Formula pricing is used in many agricultural industries where prices vary from one day to the next. The industry agrees on some type of formula which is expressed in terms of a certain price off some standard. The standard in the egg industry is the Urner Barry scale. Urner Barry sets a price for eggs for every day of the week. When egg processors contract to sell eggs they look first to the price set by the Urner Barry scale and contract to sell the eggs at a price "off" Urner Barry. Thus, for example, a processor might agree to sell eggs to a customer at 5 cents off Urner Barry for large eggs for a specific period of time. Until their agreement expires, the

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date the egg is laid. Generally, the freshness date is 30 days from the date the egg is laid.

customer may purchase large eggs at 5 cents off the current Urner Barry price per dozen. This price is sometimes expressed in terms of "five back" meaning 5 cents off the Urner Barry price.

The allegations of price discrimination made by the plaintiffs center around the actual pricing practices of Rose Acre from July 1, 1977 through June 30, 1983, the relevant period for purposes of this action. Generally, the plaintiffs have alleged that Rose Acre targeted customers of the plaintiffs and sold eggs to them at special prices in order to induce them to purchase eggs from Rose Acre instead of the plaintiffs.

In 1978, Rose Acre borrowed 7 million dollars to build facilities for the production and processing of eggs. In 1979, Rose Acre borrowed an additional

6 million dollars for its expansion project. Between the period from 1978-1982, Rose Acre increased its production capacity from less than 1.5 million layers to 3.4 million layers, an increase of about 127 percent. Rose Acre's gross revenues increased from 15.6 million dollars to 42.5 million dollars. During the same period, egg production and consumption nationally increased by about 3.8 percent. Rose Acre's expansion and increase in production capabilities resulted in substantially more eggs for Rose Acre to market and sell.

During the relevant period, five of the seven plaintiffs also experienced increased sales. Boomsma experienced increased sales of 20,891,000 dollars in 1977 to 27,632,000 dollars in 1983. Boomsma Missouri experienced increased sales from 5,272,000 dollars in 1978 to

9,766,000 dollars in 1983. Hemmelgarn experienced increased sales from 12,723,000 dollars in 1977 to 30,053,000 dollars in 1983. Mendelson experienced increased sales from 4,804,000 dollars in 1977 to 6,145,000 dollars in 1983. Peter Produce had only a small increase from 2,915,000 dollars in sales in 1977 to 2,949,000 in sales in 1983; however, Peter Produce did have increased sales of 3,361,000 dollars in sales in 1981 and 3,197,000 dollars in 1982. A.A. Poultry went from 6,222,000 dollars in 1977 to a low of 4,762,000 dollars in sales in 1983. Gressel had 13,117,000 dollars in sales in 1977 and went to a sales high of 14,701,000 dollars in 1981 before declining to 11,251,000 dollars in sales in 1983.

The evidence showed that during this period of time, Rose Acre made sales of

eggs to various customers at lower or "special" prices. Rose Acre's agreements with customers for the sale of eggs often included a specific number of these specials during the period of the agreement. The specials comprised a major portion of all of Rose Acre's sales during the relevant period of this action. In fact, the so-called "specials" may have been considered the norm. Rose Acre's weekly sales summaries introduced by the plaintiffs at trial showed that Rose Acre did offer special prices on certain eggs to various customers during the relevant period of this action.[4] Additionally, the

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[4] The weekly sales summaries of Rose Acre are but a part of the voluminous documentary evidence produced at trial. Because the Court has determined that the difference in prices charged by Rose Acre to some customers did not cause a competitive injury, see infra at pp. 8-26, the Court will not include a review of each of the documents presented at

plaintiffs testified that customers who stopped purchasing eggs from them told them that they were purchasing eggs from Rose Acre in order to get a lower price. The plaintiffs allege that these specials were sold at prices below Rose Acre's cost to produce and process the eggs and as a result of Rose Acre's below cost pricing competition in the shell egg market was harmed.

II. ANALYSIS

A. Judgment Notwithstanding The Verdict

The standard to be employed by this

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trial nor review the sales made at special prices to affected customers. The Robinson-Patman Act is concerned with the effects, if any, of the specials on competition. A specific recounting of each alleged discriminatory sale will not aid the Court in determining the effects of any pricing differences on the market. The Court infers from the documentary evidence and the testimony of the plaintiffs that Rose Acre made many sales at special prices and will analyze only the effects of these sales on the market.

Court in analyzing a motion for judgment notwithstanding the verdict is whether there is substantial evidence to support the verdict. La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984). The Court may neither judge the credibility of witnesses nor reweigh the evidence in order to find a preponderance for one side or the other. Id., citing Freeman v. Franzen, 695 F.2d 485, 489 (7th Cir. 1982), cert. denied, 463 U.S. 1214, 103 S.Ct. 3553, 77 L. Ed.2d 1400 (1983). The only proper inquiry to be made by the Court is whether the evidence presented at trial, viewed in a light most favorable to the party winning the verdict, is sufficient to support the verdict. Syvock v. Milwaukee Boiler Manufacturing Co., 665 F.2d 149, 153 (7th Cir. 1981). The evidence must be

substantial. "A mere scintilla of evidence will not suffice." La Montagne, 750 F.2d at 1410, citing Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969).

The plaintiffs have brought this action alleging that Rose Acre has engaged in price discrimination at the primary or seller level. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) prohibits certain pricing practices which lessen competition. Section 2(a) provides in pertinent part that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure,

> destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

"Price discrimination" in Section 2(a) means a price difference. F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536, 549, 80 S. Ct. 1267, 1274, 4 L. Ed.2d 1385 (1960). Thus, a different price charged to different buyers for the same product is price discrimination within the meaning of Section 2(a). O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 346 (3d Cir. 1981), cert. denied, 455 U.S. 1017, 102 S. Ct. 1711, 72 L. Ed.2d 134 (1982). However, price discrimination in and of itself is not illegal per se. Rather, "[a]t the primary level, the plaintiff must show that the 'effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . .'"

O. Hommel Co., 659 F.2d at 340, citing Anheuser-Busch, 363 U.S. at 542-43, 553, 80 S. Ct. at 1270-1271, 1276; 4 Von Kalinowski, Anti-trust Laws and Trade Regulation §§ 28.08, 29-01[4] (1980); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 87 S. Ct. 1326, 18 L. Ed.2d 406 (1967); Dean Milk Co. v. F.T.C., 395 F.2d 696, 700 (7th Cir. 1968) (footnote omitted).

In order to find liability for illegal price discrimination under Section 2(a), the plaintiffs in the present action must show that a competitive injury resulted from any differences in price. The plaintiffs may establish competitive injury by either showing: "1) actual competitive injury shown by market analysis; [or] 2) predatory intent from which competitive injury may be inferred." O. Hommel Co.,

659 F.2d at 347 (1981).

The evidence in this case showed that during the relevant period Rose Acre sold shell eggs to various retailers and wholesalers at "special prices." Rose Acre did not offer the same quantity of specials to each of its customers, nor did it sell all of its specials to the various customers at the same price. Assuming that the selling of such specials to some customers and not to others constitutes price discrimination, the question which must be resolved is whether the effect of the price differences was "substantially to lessen competition or [to] tend to create a monopoly. . . ."

The evidence presented at the trial of this cause is not sufficient to find actual competitive injury in the egg market. Rose Acre expanded its operation

and facilities during the relevant period which resulted in an increase in its production capacity from about 1.5 million layers to 3.4 million layers, an increase of about 127%. Additionally, Rose Acre's gross revenues increased from 15.6 million dollars to 42.5 million dollars. However, during this period of time, the plaintiffs grew and also increased their number of layers and gross revenues. As a group, the plaintiffs themselves had increased gross revenues from 60 million dollars in 1977 to over 92 million dollars in 1983.[5] The

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[5] At trial the plaintiffs objected to the grouping of them together to illustrate that they, as a group, had increased revenues or egg sales. Because the Robinson-Patman Act is concerned with the detrimental effects on competition rather than on individual competitors, it is appropriate in this case to look at the total sales of all the plaintiffs in combination to demonstrate that growth within the industry and among Rose Acre's competitors was occurring during the period it was alleged that Rose Acre had

evidence also showed that the plaintiff Hemmelgarn grew almost as fast as Rose Acre did during the relevant period, increasing its eggs sales from about 13 million dollars to over 30 million dollars in 1983. Experts for both parties testified that according to industry publications, 34 new egg companies entered the market during the period from 1977-1983. While some of these companies were not successful, the average growth of these new entrants was approximately 220% during the relevant time. Companies located in the areas in which Rose Acre sold its eggs which entered the market or expanded significantly include Wabash Valley Produce which grew from 2 million to 3.3 million layers; Midwest Poultry Services which grew from under 1 million to 2.25

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engaged in predatory pricing.

million layers by 1983; Croton Egg Farm entered the market and grew to 2.8 million layers by 1983; Daylay Egg Farm also entered the market and grew to 1.2 million layers by 1983. Additionally, Creighton Brothers and Weaver Brothers, both located in Indiana, expanded operations and grew during this period of time.

Even the most favorable viewing of the evidence in favor of the plaintiffs indicates a healthy, competitive market, marked by the growth of the plaintiffs and the entry and growth of other egg processors in the area. The contention that Rose Acre's expansion and growth harmed competition during this period is untenable. The evidence is insufficient to support any such contention.

Nor was there any evidence of the trend toward monopolization of the market

by Rose Acre. Dr. John Umbeck, expert witness for the defendant, testified that at the beginning of the relevant period, Rose Acre produced about 4% of all eggs in the four state area of Ohio, Indiana, Illinois and Michigan where Rose Acre sold most of its eggs. By the end of the relevant period Rose Acre's share had only increased to 8%. Dr. Umbeck calculated Rose Acres' share of egg production nationally to be about 1% during the middle of the relevant period.

Never in the short run or long run did Rose Acre ever dominate the egg market. Nor was there a time when Rose Acre could increase its prices to benefit from alleged predatory pricing. Rose Acre made a profit every year except one during the years in question which belies the charge of selling eggs before cost.

The Supreme Court has defined

monopoly power as "the power to control prices or exclude competition." U.S. v. Grinnel Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed.2d 778 (1966) quoting U.S. v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 (1956). "The existence of such power ordinarily may be inferred from the predominant share of the market." Id. Rose Acre's actual share of the market during this period in no way reflected monopoly power. See American Tobacco Co. v. U.S., 328 U.S. 781, 797, 66 S. Ct. 1125, 1133, 90 L. Ed. 1575 (1946) (two-thirds of domestic field of cigarettes, and 80% of field of comparable cigarettes constituted a substantial monopoly); Grinnell Corp., 384 U.S. 570, 86 S. Ct. 1698 (87% of central station business is monopoly power). An 8% share of the

shell egg market is simply insufficient to establish that Rose Acre had the power to exclude competition or to control prices of shell eggs either in the midwest or nationally. See Cargill, Inc. v. Monfort of Colorado, Inc., ___ U.S. ___, 107 S. Ct. 484, 93 L. Ed. 427, 441 n.15 (1986) (21% market share suggests lack of sufficient market power to engage in predatory pricing); D.E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1434 (6th Cir.), cert. denied, 467 U.S. 1242, 104 S. Ct. 3513, 82 L. Ed.2d 822 (1984). (10% to 15% share of the market not sufficient to create possibility of injury to competition). Given the economic realities of the egg industry, particularly the 1/2 cent to 1 cent per dozen eggs profit margin available to processors, it would have been impossible

for Rose Acre to effectively control prices in the market. Had Rose Acre attempted to raise its prices at any time during that period to effectively use its "monopoly power," any number of processors would have sold under the inflated price to sell eggs in line with the market. The evidence is insufficient to show a trend toward monopolization of the industry by Rose Acre.

Even though there is insufficient evidence from which actual competitive harm could be found, liability under the Robinson-Patman Act may be imposed if there is sufficient evidence of Rose Acre's predatory intent from which competitive harm may then be inferred. MCI Communications v. AT&T Co, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983). Rose Acre's predatory intent may be proven by showing either express

evidence of predatory intent or the inference of predatory intent by showing pricing below cost. O. Hommel, 659 F.2d at 347.

The plaintiffs introduced the testimony of Phil Gressel, owner of the plaintiff Gressel Produce Co., Inc., to try to establish direct evidence of Rose Acre's predatory intent. Mr. Gressel testified that on one occasion during the relevant period, Marcus Rust made an unusual casual visit to Gressel Produce Co., Inc. During a conversation with Mr. Gressel, Marcus Rust told him that Rose Acre would run him out of business. Other express evidence of predatory intent introduced at trial included proposal letters sent by Rose Acre to various customers outlining terms for the sale of eggs. Many of these proposal letters included terms for a number of

"specials" available to the customers. While the comment made by Marcus Rust to Phil Gressel may be some evidence that Rose Acre intended to compete aggressively with Gressel, and perhaps win business from his customers, it does not constitute substantial evidence that Rose Acre desired to or intended to monopolize the entire shell egg market. The very nature of healthy competition is marked by businesses which are unable or unwilling to compete losing business and perhaps even going out of business. See Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1338-39 (7th Cir. 1986); Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977), cert. denied, 439 U.S. 829, 99 S. Ct. 103, 58 L. Ed.2d 122 (1978) (vigorous competition resulting in efficient firms driving less

efficient firms out of business not proscribed by the anti-trust laws). It is when illegal practices are employed to drive others out of business that competition becomes unhealthy to the point that the anti-trust laws will impose liability. Even when Marcus Rust's comment is properly considered with the evidence that Rose Acre offered specials to various customers, it is not sufficient to establish predatory intent. Evidence introduced at trial indicates that the offering of specials to customers is common in the egg industry. The mere fact that such specials were offered does not establish predatory intent.

Predatory intent may be inferred by showing that Rose Acre priced below its cost. The plaintiffs have alleged that Rose Acre priced eggs which it produced

as a result of its extensive 1977 expansion project below its costs of producing those eggs. In its November 17, 1986 Order denying summary judgment, this Court took a position favoring the long-run incremental cost ("LRIC") standard as set forth by the Seventh Circuit Court of Appeals in AT&T, 708 F.2d 1081 as the proper standard to determine whether Rose Acre engaged in below cost pricing, which would then allow an inference of anti-competitive intent. See AT&T, 708 F.2d at 1111; Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 701, 87 S. Ct. 1326, 1335, 18 L. Ed.2d 406 (1967).[6]

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[6] The defendant Rose Acre has argued extensively that the more appropriate or correct cost standard to be applied to this case is one which measures "average variable costs." Because the plaintiffs have based their claims for relief on the harm caused them by the additional or surplus eggs created by Rose Acre's expansion, the plaintiffs have argued

In accepting the LRIC cost standard, the Seventh Circuit noted that the measure of incremental costs in a predatory pricing case was a representation of the average cost to the defendant of adding "an entire new service or product rather than merely the last unit of production." AT&T, 708 F.2d at 1115. Long-run incremental cost measures all of the costs of adding the new service or product including fixed and variable costs. Id. The use of long-run incremental cost rather than of fully distributed costs as a standard measures only the costs "which are causally related to the service or product in question." AT&T, 708 F.2d at

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that long-run incremental cost is the correct standard. The average variable cost standard is discussed infra at pp. 40-41 in connection with the Court's alternative conditional grant of Rose Acre's motion for a new trial.

1122. Furthermore, "[t]he use of long-run cost analysis may be particularly appropriate to capital-intensive processes where growth of plant and equipment is marked." AT&T, 708 F.2d at 1115.

The long-run incremental cost standard was used in the present action to determine whether the defendant engaged in predatory pricing. The plaintiffs alleged in their complaint and have argued throughout this action that Rose Acre under went an extensive expansion during 1977-1983 which resulted in the growth of Rose Acre at the rate of more than 200% during the relevant period. The plaintiffs argue that this expansion resulted in the creation of millions of surplus eggs which were disposed of by Rose Acre by a marketing strategy which included selling a large

number of specials to the plaintiffs' customers. It is these specials which the plaintiffs contend were sold below Rose Acre's costs to constitute predatory pricing practices. Because the plaintiffs have pursued this case attacking the allegedly intentionally created surplus of eggs produced during Rose Acre's expansion to be sold as specials, the long-run incremental cost standard was applied at trial to determine whether Rose Acre sold those specials at a price which was below its costs.

In its November 17, 1986 order resolving outstanding motions, this Court accepted the following definition of long-run incremental cost: "'total company cost minus what total cost of the company would be in absence of product of x, all divided by the quantity of x being

produced.' Baumal, Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing, 89 Yale L.J. 1, 9 n.26 (1979)." AT&T, 708 F.2d at 1115 n.45.

The granting of the judgment notwithstanding the verdict is warranted because the plaintiffs failed to produce sufficient evidence to support a finding that Rose Acre priced below cost. The plaintiffs used two expert witnesses in an attempt to prove that Rose Acre's pricing of its specials to customers during the relevant period was below its long-run incremental costs. The data and analysis used by these experts is inadequate to establish that Rose Acre's pricing practices were below its costs under the appropriate cost standard.

Dr. Willard Mueller, economist, testified as an expert for the plaintiffs

as to his analysis of Rose Acre's costs and pricing practices during the relevant period. Dr. Mueller testified that he had used three separate methodologies to calculate the value of Rose Acre's specials to the affected customers. Dr. Mueller testified he then made comparisons between the values of the specials under each methodology and Rose Acre's long-run incremental costs and determined that under each methodology, Rose Acre's specials for the relevant period were, except in a very few instances, below its long-run incremental costs. Dr. Mueller's opinion that Rose Acre's specials were below its long-run incremental cost however suffers from one major flaw. Throughout his discussion of the cost methodologies, he referred to Rose Acre's long-run incremental cost as calculated by the certified public

accountant.[7] Dr. Mueller never made any calculation as to Rose Acre's long-run incremental cost, but relied on the long-run incremental cost figure which he testified was calculated by the certified public accountant. While such reliance is not in itself fatal, the fact that the certified public accountant later testified that he was not able to calculate Rose Acre's long-run incremental cost because he did not have sufficient data to make such a calculation renders Dr. Mueller's opinion as to Rose Acre's pricing practices speculative and unreliable. Mr. Richard Hoeh, the expert certified public

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[7] Dr. Mueller never specifically named the certified public accountant who did the calculations upon which he relied. The most logical inference favoring the plaintiffs is that the certified public accountant to whom Dr. Mueller referred is Mr. Richard Hoeh who testified after Dr. Mueller as to various calculations which he made.

accountant testifying on behalf of the plaintiffs, explained under cross-examination the calculations he made:

Mr. Johnstone:	It is correct that what you have calculated is an amount for modified total expense per dozen of eggs by your calculation for Rose Acre for the years 1976 through the year 1983?
Mr. Hoeh:	Yes, sir, that's correct.
Mr. Johnstone:	And is it correct that the figures for those respective years in the line which says "modified total expense" is a number which would apply to every egg produced by Rose Acre in that year?
Mr. Hoeh:	Yes, it is the average of all of the production.

Mr. Johnstone: And is it correct, then, that the figure under "modified total expense" does not apply just to the eggs from any expansion by Rose Acre in any given year?

Mr. Hoeh: Yes. Again, it is the total production for the particular year.

Mr. Johnstone: Did you, in doing your work for Exhibit 54, make any calculation on the cost of producing the incremental eggs in any year?

Mr. Hoeh: This computation was an attempt to measure the total cost, but --

Mr. Johnstone: Go ahead.

Mr. Hoeh: But because I had no information available as to specific facilities, that

I was not able to do.

Mr. Johnstone: I believe we are saying the same thing.

Mr. Hoeh: I think we are.

Mr. Johnstone: Is it correct, then, that you did not make any calculation of the cost of just the cost of producing the incremental eggs which resulted from Rose Acre's expansion?

Mr. Hoeh: That's correct I was not able to do that.

Mr. Johnstone: Were you asked to do that?

Mr. Hoeh: That's what this is an attempt to do, to the extent that the information is available.

Hoeh, Cross at pp. 73-74 (October 16, 1987) (emphasis added). Mr. Hoeh's testimony that he did not calculate the cost of just the incremental eggs

resulting from Rose Acre's expansion renders Dr. Mueller's opinions which are based on the long-run incremental cost completely useless. Under Mr. Hoeh's calculations, the "modified total expenses" equals the average of all production at Rose Acre by year during the relevant years and not the incremental costs of producing the surplus eggs.

Exhibit 54[8] prepared by Mr. Hoeh to illustrate his cost calculations does not contain any information from which a jury could infer what Rose Acre's long-run incremental cost for the relevant years had been. Mr. Hoeh's calculations, testimony and Exhibit 54 are the only evidence produced at trial to show Rose Acre's costs. Even the most favorable

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[8] Plaintiffs' Exhibit 54 is reproduced in full in the appendix attached hereto.

treatment of this evidence for the plaintiffs does not provide any inkling as to what Rose Acre's long-run incremental costs as defined by the Seventh Circuit and this Court actually were during the period relevant to this action. The conflicting testimony of Dr. Mueller that he relied on long-run incremental cost figure calculated by the certified public accountant and Mr. Hoeh's testimony that he was unable to calculate such a figure leaves a void in the plaintiffs' case. The jury could not properly infer from this evidence that Rose Acre sold eggs below its long-run incremental costs.

The Court would here point out that further consideration leads this Court to believe that the correct terminology should have been average variable cost or short-run marginal cost rather than long-

run incremental cost. The Court's definition and meaning, however, is still the same as contained in Jury Instruction No. 21 which pointed out that Rose Acre's pricing should cover "the additional total company cost resulting from the additional equipment and facilities used to increase egg production divided by the increased quantity of eggs being produced." The results of this change in terminology is discussed infra at pp. 40-41.

Because the evidence presented at trial is insufficient to establish that a competitive injury resulted from any difference in price charged by Rose Acre, the verdict for the plaintiffs cannot stand. Injury to competition is an essential element of a Robinson-Patman Act claim. Without proof of such injury, judgment for the defendant Rose Acre is

appropriate. The Court will therefore vacate the jury verdict and enter judgment for Rose Acre.

The granting of the defendant's motion for judgment notwithstanding the verdict is also warranted under the "perishability defense" contained in the Robinson-Patman Act, which excludes from liability sales made in response to changing market conditions. The Fourth Proviso of Section 2(a) of the Act states:

> And provided further, that nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonable goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods conceived.

15 U.S.C. § 13(a) (emphasis added).

Rose Acre contends that its sales of

eggs at special prices were made in response to changing market conditions and to prevent the deterioration of perishable goods. The evidence presented at trial established that eggs are a perishable commodity which have a short shelf life. The freshness dates stamped on each carton of eggs allows up to 30 days from the date the egg is laid until it "expires" or is no longer fresh. During this short period of time the egg processor must clean, grade and package the egg before distributing it to wholesalers or retailers for sale to the consumer. The age of the egg effects its marketability and the price which the customer will be willing to pay. Egg production cannot be regulated by the farmer in response to daily fluctuations of demand for a specific size or grade of egg. Layers lay a combination of sizes

of eggs and the producers or processors must work with the eggs actually produced. These factors bring the sales made by Rose Acre during the relevant period within the Fourth Proviso of the Robinson-Patman Act.

Rose Acre's sales of eggs to retailers and wholesalers at special prices during the relevant period rather than to market facilitators is protected by the Fourth Proviso of the Robinson-Patman Act. The eggs produced by Rose Acre had to be distributed under the compulsion of perishability. The mere fact that Rose Acre, contrary to the choices of its competitors, chose one market over another does not render its actions predatory.

Rule 54(b) Certification

This action involves a counterclaim filed by the defendant Rose Acre against

the plaintiffs which was bifurcated from the complaint for trial by order of this Court upon motion of the plaintiffs. The issues raised by the counterclaim have not yet been tried and are still pending before this Court. The retention of the counterclaim raises questions regarding the finality and appealability of any judgment entered in favor of the defendant on the plaintiffs' complaint.

Rule 54(b), Federal Rules of Civil Procedure allows "the court to direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The purpose of Rule 54(b) is to prevent piecemeal litigation and to assure that the courts of appeals will not be subject

to successive appeals which require the consideration of the same issues. Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698, 702 (7th Cir.), cert. denied, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed.2d 359 (1984); O.D.C. Communications Corp. v. Wenruth Investments, 826 F.2d 509, 513 (7th Cir. 1987). A certification pursuant to Rule 54(b) requires that the certified claim be separate from the remaining claim, the judgment entered on the certified claim be final under 28 U.S.C. § 1291 and that district court expressly determine that there is "no just reason for delay." Wenruth Investments, 826 F.2d at 512 (citations omitted).

The certified claim and the remaining counterclaim in this action are separate within Rule 54(b). The counterclaim alleges that plaintiffs

conspired with each other to force Rose Acre to abandon its anti-competitive conduct and that when Rose Acre refused to join in the conspiracy, the plaintiffs filed their complaint to harass Rose Acre. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed.2d 464 (1961); Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc., 814 F.2d 358 (7th Cir. 1987). Resolution of the defendant's counterclaim involves a different set of factual circumstances not considered by the Court in trying the plaintiffs' complaint. While the parties to the claims are the same, there is no significant overlapping of facts necessary to the resolution of their claims. The district court will not have to reconsider the facts concerning Rose

Acre's pricing practices during the relevant period nor the effects of Rose Acre's conduct on competition. Rather, the counterclaim will raise facts concerning the plaintiffs' conduct and its harm on Rose Acre --facts not considered in resolving the plaintiffs' complaint. Moreover, the relief sought by the complaint and the counterclaim are entirely separate. Recovery on the complaint does not preclude recovery on the counterclaim. The certified claim and the counterclaim do not overlap, factually or legally, and certification under Rule 54(b) is proper.

It is particularly appropriate that the Court of Appeals consider the issues raised by the certified claim at this time. This action has been pending since 1981 and consequently has involved a great deal of time and effort by the

parties, their counsel and the Court. After consideration of the certified claim on appeal, should the Court of Appeals affirm the granting of the judgment notwithstanding the verdict and determine that the plaintiffs failed to prove an anti-trust injury, that matter would be concluded. Then all that would remain would be resolution of the counterclaim. It would be unproductive for this Court to consider at this time a counterclaim which raises different factual and legal issues prior to allowing an appeal from the entry of judgment in favor of Rose Acre on the issues raised in the complaint. Moreover, in the event that the Court of Appeals disagrees with this Court on the entry of judgment notwithstanding the verdict, the entire matter would be retried by the Court pursuant to the

conditional grant of a new trial. Because the Court instructed the jury that the long-run incremental cost standard was the correct measure of costs to determine whether Rose Acre priced below cost, it would be beneficial to receive guidance from the Court of Appeals as to the correct cost standard prior to any retrial.

As the certified claim raises issues separate from the counterclaim, there is no just reason for delay in the entry of final judgment on the certified claim. Immediate entry of judgment will allow an expedient review of the Court's decision and avoid further delay in the final resolution of this matter. The Court, therefore, directs the entry of judgment in favor of the defendant on the plaintiffs' complaint. Thus, based upon the foregoing discussion, it is the

opinion of this Court that the judgment in favor of the defendant is ripe for appeal. The counterclaim will be considered separately as necessary.

B. Motion For A New Trial

The Court has determined that the evidence introduced at trial does not support the verdict and that judgment for the defendant is appropriate. Should the Court of Appeals determine that the grant of the defendant's motion for judgment notwithstanding the verdict and the entry of judgment in favor of Rose Acre were in error, this Court finds that the grant of the defendant's motion for a new trial is necessary. The grant of the new trial is conditional and will become effective only in the event that the grant of judgment notwithstanding the verdict is reversed. See 9 Wright & Miller, Federal Practice and Procedure § 2540 (1971).

The authority to grant a motion for a new trial pursuant to Rule 59, Federal Rules of Civil Procedure is within the discretion of the trial court. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S. Ct. 188, 190, 66 L. Ed.2d 193 (1980). In determining whether to grant a motion for a new trial, unlike considering a motion for judgment notwithstanding the verdict, "the judge may consider the credibility of witnesses, the weight of the evidence, and anything else which justice requires." Spanish Action Committee of Chicago v. City of Chicago, 766 F.2d 315, 321 (7th Cir. 1985) citing Garrison v. United States, 62 F.2d 41, 42 (4th Cir. 1932); 9 Wright & Miller, Federal Practice and Procedure § 2531 (1971).

A review of all of the evidence indicates that the verdict rendered by

the jury is against the clear weight of the evidence and is grossly excessive and must therefore be set aside and a new trial granted. Additionally, because the Court finds that it was in error as to certain legal determinations it made during the course of the trial, a new trial is necessary to prevent a miscarriage of justice.

1. Robinson-Patman Liability

This Court has determined that there is insufficient evidence in the record to support a finding of liability under the Robinson-Patman Act because the plaintiffs failed to demonstrate a competitive harm or anti-trust injury compensable by the anti-trust laws. The Court has reviewed the evidence fully above at pp. 8-26, and will not undertake an extensive reanalysis of such evidence in considering the motion for a new

trial. The standard to be applied in considering the motion for the new trial is more lenient than that in considering a judgment notwithstanding the verdict--if the Court finds that the verdict is against the weight of the evidence, the grant of a new trial is appropriate. The specious nature of Dr. Mueller's opinions as to competitive harm and the lack of any facts to support these opinions mandates that the verdict be set aside. The evidence established the existence of a healthy, competitive market marked by the growth of the plaintiffs and the entry of new companies into the industry during the period of alleged predation. The plaintiffs' belief that they would have been able to grow more during the relevant period does not give rise to Robinson-Patman liability. Dr. Mueller's reliance on Mr. Hoeh's calculation of

"modified total expenses" as a measure of Rose Acre's long-run incremental costs despite Mr. Hoeh's testimony that the "modified total expenses" is a calculation of costs for all of Rose Acre's production and not the cost of producing the incremental surplus eggs renders Dr. Mueller's opinions as to competitive harm speculative and unreliable. The finding of liability under the Robinson-Patman Act cannot stand under these circumstances.

2. Excessive Damages

The financial proof of the damages which the plaintiffs sustained as a result of Rose Acre's alleged predation is insufficient to support the jury's verdict of over $9,000,000 to the seven plaintiffs. The calculations of damages presented by the plaintiffs contained unfounded assumptions which resulted in

an award of damages which are totally out of line with the profit margin in the shell egg industry.

The jury awarded the plaintiffs a total of $3,223,000 in damages from the loss of net profits on the lost sales to the plaintiffs' customers which were allegedly caused by Rose Acre. In order to prove the plaintiffs' damages from loss of profits, the plaintiffs relied on the expert testimony of Mr. Richard Hoeh, certified public accountant, who made various calculations to arrive at the damage figures adopted by the jury. Mr. Hoeh calculated each of the plaintiff's loss of net profits by first determining the volume of sales actually made by Rose Acre to a specific customer in each fiscal year. Mr. Hoeh then multiplied the dollar amount of the sales to each affected customer by a "net profit

percentage" for each plaintiff. To arrive at each plaintiff's "net profit percentage" Mr. Hoeh testified that:

> . . . I studied the individual income statements of the plaintiffs and I attempted to determine which expenses they would have had to pay in addition to those already listed on the income statement. Since many of their expenses are fixed in that they were already spent, and those expenses would not have been made or paid a second time, but many expenses would also have had to have been incurred if additional sales were made. For example, if a company would have had to buy or process more eggs it would have had to incur additional costs to ship those eggs. I judged which of those expenses would have been made if additional sales, in fact, had been realized, and I rounded that percentage to the net profit percentage amount that I have listed in the "Net Profit Percentage" column. . . .

(Hoeh Direct, p. 26.) For each plaintiff, Mr. Hoeh calculated a separate net profit percentage to be applied to the sales made by Rose Acre to the affected customer. Multiplying the dollar amount of the sale to each

affected customer for each fiscal year by the net profit percentage equaled the net income which would have been realized by the plaintiff had that plaintiff affected the sales for the customer in that year. The net profit percentages ranged from 1.00% for Gressel to 5.50% for Mendelson.[9] The total of the net income figures for all the plaintiffs equaled $3,223,000, the amount of damages awarded by the jury to represent lost profits.

Mr. Hoe's opinion as to Rose Acre's damages from loss of net profits lacks a sufficient factual basis to be a reliable accounting of any actual damages allegedly incurred by plaintiffs. The

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[9] Mr. Hoeh calculated the following net profit percentages for each of the plaintiffs:

Mendelson	5.50%	Gressel	1.00%
Hemmelgarn	5.00%	A.A. Poultry	5.00%
Peter Produce	5.00%	Boomsma	3.00%
		Boomsma Mo.	5.00%

foundation of Mr. Hoeh's opinion are assumptions made by him which are not supported by any evidence introduced at trial. The Court recognizes that Mr. Hoeh undertook a difficult task in attempting to calculate an event that never occurred (i.e., sales by the plaintiffs to the affected customers), however, even allowing some latitude for difficulty of the task, the foundation upon which his opinions are based is too speculative to support the conclusions he reached.

Through preliminary questioning by Mr. Johnstone, counsel for Rose Acre, Mr. Hoeh testified that his opinions as to lost sales by the plaintiffs assumed that all of Rose Acre's sales to each affected customer would have been realized as additional sales by the identified plaintiff. This assumption does not

consider whether the individual plaintiffs would have had the capacity or the ability to sell the eggs as additional sales to the affected customers and ignores any sales the plaintiffs may have made instead of sales to those particular customers in mitigation of any losses. Mr. Hoeh's calculations as to damages begins with the first sale made by Rose Acre to any affected customer and assumes that each every sale made to that customer thereafter was an illegal sale. His opinion does not take into account the effect, if any, that "specials" may have had on the alleged lost profits but rather considers each and every sale made to a customer. Mr. Hoeh's testimony further assumes that all of the eggs which Rose Acre sold to Balberman, a wholesaler who resold eggs to a number of

retailers, were resold to one customer, Allied, a customer to whom one of the plaintiffs had previously sold. Similarly, his opinion assumes that all of the eggs which Rose Acre sold to Certified were resold to Butera, a customer of one of the plaintiffs. There is no evidence in the record which would tend to support the assumption that all of the eggs Rose Acre sold to either Balberman or Certified were, in fact, resold to only one customer. The plaintiffs' loss of profits calculations are based on too many assumptions of fact which are unsubstantiated by the factual evidence presented at trial. The resulting damages for loss of profits calculated by Mr. Hoeh are not reliable estimates.

The unreliability and speculativeness of the calculation is

further illustrated by net profit percentage calculated by Mr. Hoeh for each plaintiff. Mr. Hoeh calculated that plaintiff Mendelson had a net profit percentage of 5.5%. Practically, this means that if eggs were selling at 50 cents per dozen,[10] Mendelson's profit per dozen eggs would equal 2-1/4 cents per dozen eggs; if eggs were selling for 60 cents per dozen, Mendelson's profit per dozen eggs would equal over 3 cents per dozen. Testimony during the trial from witnesses for the plaintiffs and defendant was that the profit margin in the industry for processors ranged from a low of 1/2 cent per dozen to a high of 1 cent per dozen eggs. In the most extreme case, the net profit percentage

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[10] Testimony at trial established that during the relevant period eggs sold from a low of 40 cents per dozen to a high of 60 to 70 cents per dozen.

calculated by Mr. Hoeh would allow Mendelson to recover two or three times the profit margin for the shell egg industry. The resulting damages are excessive.

The jury awarded an additional sum of over $6,000,000 to compensate the plaintiffs for the losses they allegedly suffered due to a general decline of prices in the market allegedly caused by Rose Acre's marketing and selling more eggs. This Court has fully discussed its determination that no competitive harm resulted from any of Rose Acre's sales during the relevant period because the evidence indicated a healthy, competitive market. The damages awarded the plaintiffs for harm due to a decline in price are unfounded. Because Rose Acre is an integrated producer and processor of eggs, it has advantages of efficiency

not available to the plaintiffs. This Court does not believe that the anti-trust laws may be used to penalize a more efficient competitor who employs new technology to increase its output. See Dean Milk Co. v. F.T.C., 395 F.2d 696 (7th Cir. 1968). The fact that Rose Acre produced substantially more eggs and placed those eggs in commerce is not a sufficient basis upon which to premise damages of more than $6,000,000 for a general decline in price. Moreover, the evidence introduced by the plaintiffs to show that the prices for eggs in the "North Central Region" declined is unreliable and based upon assumptions not supported by the record. The total damages from the alleged decline in prices exceeded the plaintiffs total profits several times over the plaintiffs' total profits earned by the

plaintiffs before Rose Acre's expansion. Under these circumstances, the Court finds that a new trial is necessary to avoid a serious injustice.

3. Errors of Law

A new trial is necessary to correct two errors made by the Court in ruling on motions made by the parties. The Court granted the plaintiffs' motion for bifurcation for trial of the issues raised by the defendant's counterclaim. Rose Acre's counterclaim alleged that the plaintiffs brought their Robinson-Patman action in order to force Rose Acre to stop its competitive pricing practices and to make it more difficult for Rose Acre to expand its business. Rose Acre contends that because the plaintiffs had an improper purpose for bringing the action, the litigation is baseless and would be a "sham" within the meaning of

the Noerr-Pennington doctrine. The Noerr-Pennington doctrine, was named after two Supreme Court cases, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed.2d 464 (1961) and United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed.2d 626 (1965). In Noerr, the Supreme Court explained when the anti-trust laws might be implicated in certain action of competitors:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

Noerr, 365 U.S. at 144. The Noerr-Pennington doctrine has been developed by the courts to include lawsuits brought by competitors solely "because of the costs

litigation imposes on the other party. . . ." Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc., 814 F.2d 358, 372 (7th Cir. 1987) citing Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), cert. denied, 461 U.S. 958, 103 S. Ct. 2430, 77 L. Ed.2d 1317 (1983). An actionable anti-trust injury may arise when an injury occurs because of the use of litigation to achieve a reduction in competition. See Premier Electrical Construction, 814 F.2d at 376. It is this very type of injury which Rose Acre has alleged.

Because the Court granted plaintiffs' motion for bifurcation, Rose Acre was precluded from offering any evidence of the plaintiffs' own pricing practices and any evidence of alleged price discussions between plaintiffs

aimed at maintaining egg prices at a certain level. The exclusion of this evidence resulted in the jury receiving an incomplete view of the shell egg industry. The introduction of the evidence and trial of the counterclaim would have been entirely proper for consideration by the jury as to the alleged losses suffered by the plaintiffs. See Dean Milk, 395 F.2d at 712. The defendant was severely prejudiced by the one-side picture of Rose Acre's use of specials during the relevant period without the consideration of any use of specials by the plaintiffs or as a practice generally in the industry.

The Court also erred in adopting the long-run incremental cost standard as a measure to determine whether Rose Acre sold eggs below cost. The application of

the long-run incremental cost standard allowed the jury to consider only the allegedly surplus eggs produced by Rose Acre after the expansion of its facilities. The long-run incremental cost standard was adopted by the Seventh Circuit in the AT&T case as a representation of the average cost to the defendant of adding "an entire new service or product rather than merely the last unit of production." AT&T, 708 F.2d at 1115. Thus long-run incremental cost measures the costs of adding a new service or product including fixed and variable costs. Id. The application of this standard to the present action is inappropriate because Rose Acre has not added a new product or service, but rather has only increased its production of an existing product. The labeling of the additional eggs produced by Rose Acre

after its expansion as "specials" or "surplus" eggs does not change the character of the eggs. Rose Acre simply increased its capacity and produced more eggs for sale in the market. In such a case, this Court believes that the correct measure of costs is one which measures the average variable costs of producing the additional eggs resulting from the increased productive capacity of Rose Acre during the relevant period. Variable costs are costs which vary with any change in the output of a product and include such costs as materials, fuel, maintenance and labor. AT&T, 708 F.2d at 1115., citing Agreeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 709-13 (1975). See also, Agreeda & Turner, 88 Harv. L. Rev. at pp. 717-21. Thus a product's average

variable cost equals the total of all its variable costs divided by the units of output. AT&T, 708 at 1115. The inclusion of fixed costs such as land and buildings in the computation of Rose Acre's costs to produce an alleged surplus of eggs rather than looking to the variable costs associated with the production of the eggs during the relevant period was prejudicial to the defendant. The Court believes that average variable cost is the correct cost standard for evaluating the predatory pricing claims in this case.

C. Plaintiff's Motion for Judgment on the Amended Counterclaim

The plaintiffs filed their Motion for Judgment on Amended Counterclaim on October 29, 1987 arguing that the jury verdict rendered on October 23, 1987 in the plaintiffs' favor precludes Rose Acre as a matter of law from recovering on its

Amended Counterclaim. Because the Court has granted Rose Acre's motion for judgment notwithstanding the verdict and has vacated the jury verdict for the reasons discussed above, the basis for the plaintiffs' motion no longer exists. The Court must therefore deny the motion for judgment on the Amended Counterclaim.

If it were to become necessary to try this case again pursuant to the Court's conditional grant of the defendant's motion for a new trial, the plaintiffs' motion for judgment on the amended counterclaim must still be denied. The Court's determination that it erred by bifurcating the trial of the Amended Counterclaim and the trial of the plaintiffs' complaint for the reasons set forth fully above mandates that the issues raised in the Amended Counterclaim be fully tried at any new trial of this cause.

EXHIBIT
54

ROSE ACRE FARMS AND SUBSIDIARIES
CALCULATION OF ANNUAL EXPENSES ADJUSTED BY DEPRECIATION ATTRIBUTABLE
TO PLANT AND EQUIPMENT EXPANSION

	June 30, 1980		June 30, 1981		June 30, 1982		June 30, 1983	
	AMOUNT	PER DOZEN	AMOUNT	PER DOZEN	AMOUNT	PER DOZEN	AMOUNT	PER DOZEN
Total Expenses & Deductions	31,448,649	0.563735	42,879,016	0.590724	43,797,730	0.588551	41,379,807	0.567649
Less Provision for Fed Tax	(2,396,000)	(0.042950)	(176,000)	(0.002425)	1,618,478	0.021749	1,351,106	0.018534
Less Proceeds Of Lawsuit			(460,082)	(0.006338)				
Less Depreciation Expense	2,514,088	0.045066	3,147,464	0.043361	2,951,291	0.039659	2,822,640	0.038721
Subtotal	31,330,561	0.561618	40,367,634	0.556126	39,227,961	0.527143	37,206,061	0.510393
Plus Adjusted Depreciation:								
1976 - 1977 Actual	NA	NA	NA	NA	NA	NA	NA	NA
1976 - 1977 5 Decline	281,165	0.009098	175,728	0.005686	70,291	0.002274	0	0.000000
Total Adjusted Depreciation	281,165	0.005040	175,728	0.002421	70,291	0.000945	0	0.000000
Plus Allocation/Plant Expansion								
FYE 1978 Increase	443,432	0.014349	443,432	0.014349	443,432	0.014349	443,432	0.014349
FYE 1979 Increase	988,469	0.017719	988,469	0.013618	988,469	0.013283	988,469	0.013560
FYE 1980 Increase	898,489	0.016106	898,489	0.012378	898,489	0.012074	898,489	0.012325
FYE 1981 Increase	NA	NA	407,535	0.005614	407,535	0.005476	407,535	0.005591
FYE 1982 Increase	NA	NA	NA	NA	174,024	0.002339	174,025	0.002387
FYE 1983 Increase	NA	NA	NA	NA	NA	NA	133,438	0.001831
Total Plant Expansion Alloc.	2,330,390	0.041774	2,737,924	0.037719	2,911,948	0.039131	3,045,387	0.041777
Modified Total Expenses	33,942,116	0.608432	43,281,286	0.596266	42,210,300	0.567218	40,251,448	0.552170
Total Income	28,765,904	0.515645	43,536,240	0.599778	47,722,307	0.641289	43,238,727	0.593150
Difference	5,176,212	0.092787	(254,954)	(0.003512)	(5,512,107)	(0.074071)	(2,987,279)	(0.040980)

ROSE ACRE FARMS AND SUBSIDIARIES
CALCULATION OF ANNUAL EXPENSES ADJUSTED BY DEPRECIATION ATTRIBUTABLE
TO PLANT AND EQUIPMENT EXPANSION

	June 30, 1976 AMOUNT	PER DOZEN	June 30, 1977 AMOUNT	PER DOZEN	June 30, 1978 AMOUNT	PER DOZEN	June 30, 1979 AMOUNT	PER DOZEN
Total Expenses & Deductions	16,682,051		19,073,060	0.596071	16,106,837	0.521183	22,067,315	0.538937
Less Provision for Fed Tax	1,793,224		1,279,630	0.039991	48,000	0.001553	(436,600)	(0.010663)
Less Proceeds Of Lawsuit								
Less Depreciation Expense	702,912		675,535	0.021112	733,978	0.023750	1,462,421	0.035716
Subtotal	14,185,915		17,117,895	0.534968	15,324,859	0.495880	21,041,494	0.513884
Plus Adjusted Depreciation:								
1976 - 1977 Actual	702,912		675,535	0.021112	NA	NA	NA	NA
1976 - 1977 % Decline	NA		NA	NA	492,038	0.015921	386,602	0.012510
Total Adjusted Depreciation	702,912		675,535	0.021112	492,038	0.015921	386,602	0.009442
Plus Allocation/Plant Expansion								
FYE 1978 Increase	NA	NA	NA	NA	443,432	0.014349	443,432	0.014349
FYE 1979 Increase	NA	NA	NA	NA	NA	NA	988,469	0.024141
FYE 1980 Increase	NA	NA	NA	NA	NA	NA	NA	NA
FYE 1981 Increase	NA	NA	NA	NA	NA	NA	NA	NA
FYE 1982 Increase	NA	NA	NA	NA	NA	NA	NA	NA
FYE 1983 Increase	NA	NA	NA	NA	NA	NA	NA	NA
Total Plant Expansion Alloc.	0	0	0	0.000000	443,432	0.014349	1,431,901	0.034970
Modified Total Expenses	14,888,827		17,793,430	0.556080	16,260,330	0.526150	22,859,997	0.558296
Total Income	18,698,947		20,219,916	0.631912	16,258,635	0.526095	23,463,257	0.573029
Difference	(3,810,120)		(2,426,486)	(0.075832)	1,695	0.000055	(603,260)	(0.014733)

APPENDIX C

Opinion and Order of the United States District Court for the Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.A. POULTRY FARMS, INC., BOOMSMA PRODUCE, INC., GRESSEL PRODUCE CO., INC. HEMMELGARN & SONS, INC., MENDELSON EGG COMPANY, PETER PRODUCE, INC., and BOOMSMA PRODUCE OF MISSOURI, INC.	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 81-466-C
ROSE ACRE FARMS, INC.,	)	
Defendant.	)	

ORDER RESOLVING ALL
OUTSTANDING MOTIONS

This cause is before the Court upon the multiple motions filed by the various parties in this case.

Whereupon the Court, having considered the memoranda filed in support and opposition to the parties' respective positions, and being duly advised in the premises, hereby rules as follows:

1. The defendant's motion for summary judgment is DENIED;

2. The plaintiffs' motion to dismiss the defendant's counterclaim is DENIED;

3. The defendant's motion to reconsider the Magistrate's ruling to defer the discovery of the plaintiffs' costs of production is GRANTED, and production of said documents is no longer deferred;

4. The defendant's motion to compel production of documents is DENIED;

5. The plaintiffs' motion for a procedural order in contemplation of the defendant's motion for summary judgment is DISMISSED as moot, and if the requested documents have not yet been produced, the parties should bring the same to the Court's attention in an appropriate motion; and

6. The defendant's motion for attorney's fees pertaining to motion no. 5 supra is DENIED.

IT IS SO ORDERED.

DATED this 17th day of November, 1986.

James E. Noland
U.S. District Judge

MEMORANDUM ENTRY

I. FACTUAL BACKGROUND

Summary judgment is appropriate when there exists "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, a court must construe the facts alleged in a light most favorable to the party opposing the motion for summary judgment. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed.2d 176 (1962) (per curiam); Hermes v. Hein, 742 F.2d 350, 353 (7th Cir. 1984). Accordingly, the facts, for the purposes of this motion, are as follows:

This is an action between egg processors involving the pricing practices of one egg processor, the defendant, Rose Acre Farms, Inc. ("Rose Acre"). Participants in the egg industry

can be generally categorized into five separate groups:

1. Producers: Producers actually maintain the live, egg-laying hens and sell the eggs laid by such hens to the processors. In most cases, these producers are small, independent farmers.

2. Processors: Processors purchase eggs directly from the producers, clean, carton, and grade the eggs. Processors have three separate groups to which to sell their eggs: wholesalers, retailers and "market facilitators."

3. Wholesalers: Wholesalers are the most common mechanism by which the eggs are placed in the retail market. Wholesalers purchase the eggs from the processors and sell/distribute those eggs to the retailers.

4. Retailers: Retailers are the retail stores that actually sell the eggs to the public consumer. Ideally, a processor would prefer to sell his eggs directly to the retailer in order to avoid the "middle man" wholesaler. When this is not possible, which is normally the case, the processor usually prefers to sell his eggs to the wholesaler. Generally, when a processor is not able to sell his eggs to a retailer or a wholesaler, then the processor must sell his surplus eggs to the "market facilitators."

5. Market Facilitators: Market facilitators represent an alternative, ancillary market that provides an outlet for eggs that are not disposable along traditional selling lines. This group includes egg breakers which are egg product factories that actually use ("break") the egg to produce other goods; egg clearing houses which match suppliers and customers in other geographic markets; and egg exporters who sell the eggs in the international market. Generally, egg breakers represent the least attractive alternative to the processors as their prices are customarily lower. As a result, producers do not normally sell their eggs to the breakers unless such producer possesses a surplus or excess supply.

Based upon the information presented to the Court, it would appear that the foregoing is a fair statement of the egg market industry. The plaintiffs in this case are processors that are located in various parts of the midwest. As processors, they purchase their eggs from producers, usually small independent farmers, and sell them to either

wholesalers, retailers, or market facilitators. The defendant, Rose Acre, on the other hand, is an integrated producer and processor of eggs located in southern Indiana. Because it produces and processes eggs at a single location, it may enjoy certain efficiency benefits not available to the plaintiff processors. Rose Acre is the largest integrated producer-processor in Indiana, Illinois, Iowa, Michigan, Missouri and Ohio.

The price obtained by an individual processor of eggs in the short run is dependent on the supply and demand of the egg industry in his location. Moreover, because eggs come in different grades and different sizes, each grade or size or combination of both has an individual supply if not an individual demand. In addition, because eggs do not have an

indefinite shelf life, the price of a processor's eggs are affected by the age of the egg (the older the egg, the lower the value). Because there are no close substitutes for eggs, the demand curve is downward sloping which means that as the supply of eggs in the processor's market increases, the price of the eggs decreases (i.e., the eggs are more plentiful and thus less expensive). This price structure is further complicated by the infusion of the market facilitators, each with their own independent supply and demand markets.

The simplified picture in the egg industry is this. Taking a specific point in time, as the egg supply in the local market begins to exceed the finite demand of the wholesalers and retailers (the primary market) in that locale at the market price, then those "surplus"

eggs must be disposed of through market facilitators (the secondary market). The price customarily obtainable from the facilitators is lower than that available from the wholesalers/retailers. These dynamics are further exacerbated by the fact that the eggs' shelf life is not, as was noted above, indefinite. As the supply of eggs in a given market begins to exceed the demand of the wholesalers and retailers, a processor may be forced to sell eggs in a single batch at different prices in order to distribute an entire batch before they "expire." This type of price differentiation is both an accepted and legal practice in the egg industry. It is illegal, however, simultaneously to sell similar eggs to members of the same level of the egg industry (e.g., wholesalers) at different prices.

The plaintiffs allege that Rose Acre has engaged in such illegal "price discrimination" or "predatory pricing" in violation of § 2(a) of the Clayton Act of 1914, as amended by the Robinson-Patman Act of 1936, 15 U.S.C. § 13 (1982).[1] Generally, this section forbids a seller from simultaneously charging two similar buyers different prices for the same products. The plaintiffs allege that

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[1] The Robinson-Patman Act provides in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Rose Acre has employed this technique to solicit the plaintiffs' customers by offering such customers illegally low prices. The plaintiffs accuse the defendant of charging the plaintiffs' customers lower prices than it was charging its own customers. The plaintiffs seek treble damages for the economic injury they are alleged to have suffered because of this discriminatory pricing.

The Court now addresses the pending motions. The defendant has filed (1) a motion for summary judgment, (2) a motion to compel the production of certain documents, (3) a motion to reconsider the Magistrate's ruling to defer the discovery of plaintiffs' costs of production, and (4) a request for attorney's fees in regard to one of the plaintiffs' motions. The plaintiffs have

filed (1) a motion to dismiss the defendant's counterclaim and (2) a motion for a procedural order in contemplation of the defendant's motion for summary judgment.

II. DISCUSSION

A. Summary Judgment

The defendant raises three distinct arguments in support of its motion for summary judgment. First, the defendant argues that its method of disposing of surplus eggs was not unlawful. Secondly, it argues that some of the plaintiffs lack standing to maintain a claim against Rose Acre. Thirdly, the defendant argues that its practices have not injured competition; thus, they are entitled to judgment as a matter of law.

1. Pricing of surplus eggs

Part of the complaint pertains to Rose Acre's method of distributing its

surplus eggs. The parties concede that on many occasions during the relevant time period, Rose Acre produced a surplus of eggs and those surplus eggs were sold at a price below that of the non-surplus eggs. Rose Acre maintains that rather than distributing its surplus eggs to the secondary market, the facilitators, it sold its surplus eggs to its existing and potential wholesale/retail customers at a "special discount." Rose Acre reasons that any savings discount should be passed along to the primary market (its customers) rather than the secondary market. Rose Acre also contends that because eggs are "perishable goods," the Fourth Proviso of the Robinson-Patman Act permits price discrimination.[2]

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[2] The Fourth Provision of the Robinson-Patman Act provides in pertinent part:

And provided further, That nothing

Summary judgment on this issue is precluded, however, as the following genuine issues of fact remain in dispute. First, the parties substantially disagree as to the "perishability" and acceptable shelf-life of eggs. Construing the facts most favorable to the plaintiffs, Rose Acre has overstated the urgency of distribution; thus, the appropriateness and extent of the statutory distress exemption is subject to determination after presentation of evidence which may be conflicting.

> herein contained shall prevent price changes from time to time where in response to changing conditions affect the market for or the marketability of the goods concerned such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

15 U.S.C. § 13(a) (1982).

Secondly, the plaintiffs have submitted materials that create a genuine issue of fact as to whether Rose Acre intentionally maintained a perpetual surplus of eggs in order to justify a constant "special discount" to certain customers. In Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97 (10th Cir.), cert. denied, 414 U.S. 975 (1973), a bakery substantially expanded production during saturated market conditions and sold the excess under a private label at a lesser prices. After the baker had eliminated some of the competition, it raised its prices and eliminated all discounts. The court concluded that such conduct was "based on more than 'fierce competitive instincts,'" id. at 104, and constituted illegal price discrimination pursuant to the Robinson-Patman Act. Although Rose

Acre's conduct in this case has not caused a similar result, a genuine issue of fact exists as to whether Rose Acre expanded and maintained its production with the intent to destroy competition.

Finally, the parties disagree as to whether sale of surplus eggs to (a) the primary market at a discount, or (b) the secondary market at the secondary market rate, maximizes profits. Construing the facts in favor of the plaintiffs, Rose Acre has failed to maximize its profits by foregoing the comparatively higher prices offered by the secondary market. Although it is possible that Rose Acre's sales tactics merely constitute fierce competition for the retailer/wholesaler market (designed to disrupt cartel pricing), for the purposes of summary judgment this Court concludes that a genuine issue of fact exists as to Rose

Acre's intent in failing to maximize its profits.

2. Standing of some plaintiffs

Rose Acre challenges portions of the plaintiffs' complaint on the grounds that those plaintiffs lack standing to pursue those claims. Rose Acre asserts four reasons in support of its position: (a) because Willowbrook was a wholly-owned subsidiary of one of the plaintiffs, A.A. Poultry, then A.A. Poultry could not allege that Rose Acre affected A.A. Poultry's sale to its own subsidiary; (b) a supplier does not have standing to challenge Rose Acre's sales to customers of that supplier's customers; (c) certainly plaintiffs lost no sales because of Rose Acre's conduct; and (d) Rose Acre never consummated some of the alleged sales, thus those sales cannot be challenged. With regard to "(a)", a

genuine issue of facts exists as to Willowbrook's status as an alter ego of A.A. Poultry, thus summary judgment based on that rationale is inappropriate.

The issue of supplier standing ("(b)" supra), however, is a question of law that merits some discussion. Rose Acre contends that because many of the sales the plaintiffs are challenging were made to the customers who were customers of the plaintiffs rather than the immediate customers of the plaintiffs, the plaintiffs are too remote to challenge those sales and thus lack standing. Rose Acre reasons that the plaintiffs' customers constitute the more appropriate plaintiffs to pursue any antitrust litigation against Rose Acre. Rose Acre concludes that suppliers as a class lack standing to challenge discriminatory sales to customers of

their customers.

It appears, however, that there is no "black letter" standing rule which can be flatly applied to all antitrust circumstances. See Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 536 & n.33, 103 S. Ct. 897, 907-08 & n.33, 74 L. Ed.2d 723 (1983) (each case should be analyzed independently). In Local Beauty Supply, Inc. v. La Maur, Inc., 787 F.2d 1197 (7th Cir. 1986), the court indicated that in order to satisfy antitrust standing a plaintiff must have suffered an "antitrust injury" and be a "proper party" to bring the action. Id. at 1201.

An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."

Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed.2d 701 (1977). The Seventh Circuit, like almost all of the other circuits, has not yet applied the teachings of Associated General, the most recent Supreme Court antitrust standing decision, to a Robinson-Patman Act case; thus, there are no controlling decisions as to what constitutes a Robinson-Patman "antitrust injury." The Third Circuit has recently addressed this issue, concluding that although Associated General was a Sherman Act case, "the general principles developed in the Sherman Act cases [should be applied] in light of the particular law creating the antitrust violation." Gregory Marketing Corp. v. Wakefern Food Corp., 787 F.2d 92, 95 n.5 (3d Cir. 1986). As a result, the question in Robinson-Patman Act

standing cases is what "injury" was the Robinson-Patman Act "intended to forestall." Associated General, 459 U.S. at 540, 103 S. Ct. at 909. It was noted in American Oil Co. v. F.T.C. that the "protection intended to be afforded by the statute is directed to the preservation of competition. The statute's concern with the individual competitor is but incidental." 325 F.2d 101, 104 (7th Cir. 1963), cert. denied, 377 U.S. 954 (1964) (emphasis in original); see also Lloyd A. Fry Roofing Co. v. F.T.C., 371 F.2d 277, 281 (7th Cir. 1966). Because the defendant has independently contested the injury to competition issue and such issue involves identical considerations, the question of whether an "antitrust injury" has occurred will be considered in the ensuing section of this order. The

question remaining in this section, is whether the plaintiffs are the "proper parties" to pursue this antitrust litigation in the sense of causation and the directness of the injury alleged.

It appears that this Circuit adheres to the "target area" test to determine whether the plaintiffs are too remote to pursue their claims.[3] "The target area test focuses on the area affected by the anticompetitive conduct, requiring that the plaintiff be within the area of the economy which was endangered by the breakdown of competition and that plaintiff's injury be a direct result of

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[3] There is some doubt as to the vitality of the "target area" test after the Associated General decision. See Associated General, 459 U.S. at 536 n.33, 103 S. Ct. at 907 n.33; Haff v. Jewelmont Corp., 594 F. Supp. 1468, 1473 & n.3 (N.D. Cal. 1984). Neither the Supreme Court nor the Seventh Circuit have expressly repudiated it, thus this Court will employ it to guide its decision.

the lessening of that competition." In re Industrial Gas Antitrust Litigation (Bichan), 681 F.2d 514, 516 (7th Cir. 1982), cert. denied sub nom. Bichan v. Chemetron Corp., 460 U.S. 1016 (1983).[4]

Assuming, arguendo, that the plaintiffs can establish a competitive injury for the purposes of summary judgment, the injury to competition is occurring at the processor level of the egg production chain. As Rose Acre captures more of the egg market through its alleged price discrimination, the individual processors may well lose their

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[4] The other distinct test mentioned by the Bichan court is the "direct injury" test--which involves notions of privity, focusing upon the injured party, and the antitrust malefactor. Bichan, 681 F.2d at 516. This approach, however, has also been criticized for its inflexibility. See In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir.), cert. denied sub nom. Morgan v. Automobiles Mfg. Ass'n., 414 U.S. 1045 (1973).

ability to compete with Rose Acre. Moreover, the very purpose of the alleged price discrimination was to capture the business of the wholesale and retail markets. Thus, the area affected by the alleged illegal expansion of Rose Acre is that of the egg processors.[5]

In addition, the recent standing decisions have emphasized the importance of the competitive relationship between the plaintiff and the defendant in order to determine directness. See Associated General, 459 U.S. at 539, 103 S. Ct. at 809 (Union "neither a consumer nor a competitor" in the restrained market); Gregory Marketing, 787 F.2d at 97 (Defendant's "competitors felt the

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[5] This conclusion is supported by the fact that Rose Acre has repeatedly emphasized that the efficiency it obtained because of its integration gives it a special advantage in the processing market.

effects of the injury most directly"). As noted above, Rose Acre and the plaintiffs are in direct competition in the egg processing market and that market is the market endangered by the alleged price discrimination.

Moreover, the unique features of the egg industry warrant consideration. Unlike other industries, the processors directly compete with one another in the wholesale, retail and facilitator markets. Because of this factor, illegal price discrimination in any one of these three markets could result in direct competitive harm to other processors. Furthermore, because the egg is a "finished product" when it leaves the hands of the processor, any injury inflicted upon his distribution chain (wholesaler, retailer or facilitator) is inflicted upon the processor. Because

(a) the plaintiffs all fall within the "target area;" (b) they would be the direct victims of any alleged price discrimination by Rose Acre; and (c) their alleged injury is precisely that for which the Robinson-Patman Act was intended to remedy, they have standing to pursue their complaint.[6]

3. Injury to competition

The defendants are correct in arguing that in order to establish any Robinson-Patman Act case for price discrimination, the plaintiffs must show that the "price differences [create] a reasonable probability of injury to competition." Lloyd A. Fry Roofing Co. v. F.T.C., 371 F.2d 277, 281 (7th Cir.

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[6] Because each individual plaintiff has standing and has alleged a compensable claim for damages, the question as to the actual amount of damages each plaintiff has incurred, if any, will be resolved at trial.

1967). A plaintiff can satisfy the competitive injury requirement establishing "actual competitive injury shown by market analysis; [or] (2) predatory intent from which competitive injury may be inferred." O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 347 (3rd Cir. 1981), cert. denied, 456 U.S. 965 (1982); see also 4 Von Kalinowski, Antitrust Laws and Trade Regulation, § 29.02 n.1 & 2 (1984).

In this case, the defendant has argued that during the alleged "predatory period" the plaintiffs have all enjoyed economic success that exceeded that of the average egg processor nationally. In addition, the defendant asserts that rather than moving toward a stage of concentration during the pertinent time frame, the relevant egg processor market has expanded because of the entrance of

five new egg processors. Thus, a serious question is raised as to whether Rose Acre's conduct has inflicted any significant injury upon competition in the relevant market.[7]

As a result, in order for the

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[7] The underlying principle of price discrimination (i.e., the reason it is a target of the antitrust laws) is that one competitor with significant market power will use that power to eliminate his competitors and thereby reduce competition overall. From an economic standpoint, in a competitive market this result can be achieved only if the predatory competitor sacrifices present revenues in that market in order to underprice his competitors and achieve monopoly power in that market at some subsequent point. Once monopoly power is obtained, then the price discriminator substantially raises his prices in order to recoup his "lost revenues."

Because all of the plaintiffs have flourished financially, and because five new competitors have recently entered the relevant market without apparent difficulty, either Rose Acre's alleged predatory scheme was an ill-conceived business maneuver, or Rose Acre will have to wait quite a long time to recoup any financial advantages from "decreased competition."

plaintiffs to survive this motion for summary judgment, they must do so by establishing predatory intent. "Predatory intent can be shown by two means: (a) by express evidence; and (b) by inference from 'below cost' pricing." O. Hommel Co., 659 F.2d at 347. The plaintiffs have suggested two instances of "express evidence" of Rose Acre's predatory intent but the Court believes it is unnecessary to address those instances at present.

The focus therefore shifts to the question of "below cost" pricing. "[A] finding of below cost pricing permits the jury to infer; or even presume anticompetitive intent." M.C.I. Communications v. A.T.&T. Co., 708 F.2d 1081, 1111 (7th Cir.), cert. denied, 464 U.S. 891 (1983); see Utah Pie Co. v. Continental Baking Co., 386 U.S. 685,

701, 87 S. Ct. 1326, 1335, 18 L. Ed.2d 406 (1967).[8] Unfortunately, however, "cost" is not a self-defining term because businesses classify their costs into a number of categories, e.g., fixed cost, variable cost, marginal cost, total cost, fully distributed cost, average total cost, average variable cost, and incremental cost. All of these cost standards have their own deficiencies for Robinson-Patman Act purposes, but because the Seventh Circuit recently adopted a long-run incremental cost standard ("LRIC") as its cost measure, A.T.&T., 708 F.2d at 1114-20, this Court will adopt it as well.

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[8] This methodology employs the "double inference" test. Predatory intent is inferred from below cost pricing, and competitive harm, in turn, is inferred from the predatory intent. See O. Hommel, 639 F.2d at 347; Pacific Engineering & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790, 798 (10th Cir.), cert. denied, 434 U.S. 879 (1977).

In the A.T.&T. case, the Seventh Circuit accepted the following definition of LRIC: "'total company cost minus what total cost of the company would be in absence of production of X, all divided by the quantity of X being produced.' Baumal, Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing, 89 Yale L.J. 1, 9 n.26 (1979)." A.T.&T., 708 F.2d at 1115 n.45. This standard is particularly appropriate in the instant case because Rose Acre undertook an ambitious program of capacity expansion during the relevant time period. The LRIC standard determines the cost of this expansion in order to establish whether the sale of the "expanded eggs" exceeds the cost of the expansion. "The use of long-run cost analysis may be particularly appropriate to capital-intensive processes where

growth of plant and equipment is marked." A.T.&T., 708 F.2d at 1115.

The question of whether Rose Acre's price exceeded LRIC is one of fact. Taking into consideration the affidavits of the expert for the plaintiffs--Dr. Mueller, the complicated dynamics of egg pricing, the admonitions of Poller v. Columbia, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed.2d 458 (1962), Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 553 (7th Cir. 1980), and Kaplan v. 442 Wellington Co-op Bldg. Corp., 567 F. Supp. 53, 55 (N.D. Ill. 1983), and construing the facts in light most favorable to the plaintiffs, this Court believes that a genuine issue of fact exists as to whether Rose Acre's prices were below its long run incremental costs.

B. Rose Acre's Counterclaim

Rose Acre filed a counterclaim against the plaintiffs alleging that such plaintiffs had conspired with one another to force Rose Acre to abandon its competitive conduct and join the plaintiffs in an illegal anticompetitive conspiracy. Rose Acre further alleges that when it refused to join the conspiracy, plaintiff Boomsma-Missouri and others brought this lawsuit to harass Rose Acre, thereby compelling Rose Acre to terminate its competitive conduct. The plaintiffs filed a motion to dismiss the defendant's counterclaim for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

A complaint or countercomplaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of facts in support of his claim

which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45, 78 S. Ct. 99, 102, 2 L. Ed.2d 80 (1957). Furthermore, for the purposes of a motion to dismiss made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, this Court accepts as true all of the facts alleged by the complainant. United Independent Flight Officers, Inc. v. United Air Lines, 756 F.2d 1262, 1264 (7th Cir. 1985).

The general rule is that an antitrust litigant can petition or attempt to influence governmental action with complete immunity from the antitrust laws because of the First Amendment. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed.2d 464 (1961). This doctrine applies to adjudicatory proceedings. See California Motor

Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed.2d 642 (1972). Such petitioning, however, is not protected if the petitioning is merely used as a "sham" to harass the defendant (the "sham exception"). Id. The Seventh Circuit has determined that the filing of a single lawsuit may constitute such a sham, thereby subjecting the complainant to antitrust liability. M.C.I. Communications v. A.T.&T. Co., 708 F.2d 1081, 1153-55 (7th Cir. 1983).

In that case, the Seventh Circuit recognized the following definition of a sham litigation:

> Without a doubt, the intention to harm a competitor is not sufficient to make litigation or administrative proceedings a sham. That anticompetitive motive is the very matter protected under Noerr-Pennington. Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but

> by the simple fact of the institution of litigation.

A.T.&T., 708 F.2d at 1156 (quoting Gainsville v. Florida Power & Light Co., 488 F. Supp. 1258 (S.D. Fla. 1980). Thus, this Court is unable to conclude that Rose Acre cannot prove any set of facts to support its counterclaim. As a result, the plaintiffs' motion to dismiss Rose Acre's counterclaim is denied.

C. Motion to Reconsider Magistrate's Ruling

A pretrial conference in this case was held before Magistrate J. Patrick Endsley on November 4, 1981. A paragraph of the order issued at that conference provided "[p]laintiffs will produce documents relating to the sale and purchase of eggs where these documents are relevant to damages. The production of these documents relating to cost of production will be deferred until the

Court's ruling on the motion to strike." The motion to strike subsequently became moot, and the defendant then filed a motion to reconsider the Magistrate's ruling.

Initially, the Court notes that Magistrate Endsley's decision to defer the costs of production until the motion to strike was resolved was neither clearly erroneous nor contrary to the law. Moreover, because the purpose of the deferral no longer persists, and because the plaintiffs' cost of production is relevant to the claim (and perhaps the counterclaim as well), the plaintiffs are ordered to produce their costs of production for the relevant time period. The Court further orders that the plaintiffs will have seventy-five (75) days from the date of this Order within which to respond.

D. Motion to Compel Production

The plaintiffs plan to use an expert, Dr. Willard Mueller, during the trial of this case. In preparation for trial, the plaintiffs gave Dr. Mueller various documents for his review. The defendant filed a motion, pursuant to Rule 37 of the Federal Rules of Civil Procedure, to compel the production of such documents.

This Court, having reviewed the memoranda and documents filed both in support and in opposition of the motion, now concludes that the documents in question fall within the work-product privilege of Rule 26(b)(3) and (4). Fed. R. Civ. P. 26(b). The Court holds that the defendant has not made a sufficient showing to justify the discovery of the relevant materials.

E. Plaintiffs' Motion for A Procedural Order

The plaintiffs requested this Court to issue a novel procedural order pertaining to certain portions of the defendant's cost data. The plaintiffs allege that certain critical cost data of the defendant has been withheld from them. The plaintiffs asked this Court to postpone its decision on the summary judgment issue until the plaintiffs obtained the cost data. Rose Acre contended (a) that it was willing to provide the relevant documents, (b) that it had made such documents available for quite some time, and (c) that the plaintiffs could glean the requested information from other documents.

Because the Court is denying the defendant's motion for summary judgment, the plaintiffs' motion for a procedural order to postpone summary judgment is mooted and therefore dismissed.

Furthermore, because the motion has not been updated for quite some time and the parties disagree as to whether the disputed documents are available, the Court rules as follows. If the plaintiffs' dissatisfaction with the discovery of the cost data and related items continues, then appropriate motions for discovery should be filed with this Court. The motions should update the Court on the present status of discovery, as well as setting forth the reasons why the discovery should or should not occur.

F. Motion for Attorney's Fees

The defendant filed a motion for attorney's fees pursuant to Rule 11 of the Federal Rules of Civil Procedure in response to the plaintiffs' motion for a procedural order. The defendant contends that the plaintiffs' motion for a procedural order "was based on totally

groundless charges." In reviewing the motions and the memoranda pertaining thereto, this Court concludes that the plaintiffs' motion possessed sufficient merit to withstand a request for attorney's fees.

III. CONCLUSION

For the reasons stated above, the defendant's motion for summary judgment is denied; the plaintiff's motion to dismiss the defendant's counterclaim is denied; the defendant's motion to reconsider the Magistrate's ruling is granted; the defendant's motion to compel the production of documents is denied; the plaintiffs' motion to obtain a procedural order is dismissed as moot with instructions; and the defendant's motion for attorney's fees is denied.

Supreme Court, U.S.
FILED
FEB 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

A.A. POULTRY FARMS, INC., *et al.*,
Petitioners,

v.

ROSE ACRE FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. (a) Whether Petitioners' Questions 1(a)-(c) are based on a mischaracterization of the Court of Appeals' opinion?

(b) Whether Petitioners' Questions 1(a)-(c) are based on factual assertions that are not supported by the evidence in this case? In particular: (i) whether there is sufficient evidence to support Petitioners' contention that the egg market is an "oligopoly"; (ii) whether there is sufficient evidence to support a finding of predatory intent, notwithstanding findings by both the Court of Appeals and the District Court that Petitioners failed to present any probative evidence of predatory intent; and (iii) whether there is sufficient evidence to support a finding that Respondent's prices were below any relevant measure of cost, notwithstanding the District Court's undisturbed finding that Petitioners failed to present sufficient evidence of below-cost pricing?

(c) Whether, in any event, Petitioners' Questions 1(a)-(c) present any issue meriting review by this Court?

2. Whether certiorari should be granted to review a fact-specific alternative holding of the District Court, relating to the "perishable goods" exemption in the Robinson-Patman Act, that was not addressed by the Court of Appeals and was not the basis for the Court of Appeals' judgment?

3. Whether Petitioners presented sufficient evidence to sustain their burden of proving price discrimination in violation of the Robinson-Patman Act?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Respondent Rose Acre Farms, Inc., was defendant-appellee below. Respondent does not have any parent or non-wholly-owned subsidiary company required to be listed separately pursuant to Rule 29.1. The Petitioners, plaintiffs-appellants below, are listed on page ii of the Petition for a Writ of Certiorari, along with the information regarding Petitioners' parent and subsidiary companies.

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent, Rose Acre Farms, Inc. ("Rose Acre"), submits this brief in opposition to the Petition for a Writ of Certiorari filed by Petitioners A.A. Poultry Farms, Inc., et al. The Petition seeks review of a unanimous decision by the United States Court of Appeals for the Seventh Circuit (Petition App. A) affirming a judgment entered by the United States District Court for the Southern District of Indiana (Petition App. B). For the reasons explained below, Rose Acre urges the Court to deny the Petition.

STATEMENT OF THE CASE [1]

A. Procedural Background

This is a private antitrust action brought against Respondent Rose Acre by seven of its competitors (Petitioners A.A. Poultry Farms, Inc., et al.) for alleged "predatory price discrimination" in violation of Clayton Act 2(a), as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982) ("the Robinson-Patman Act"). Rose Acre filed an amended counterclaim in the District Court alleging that Petitioners were engaged in an illegal conspiracy to stabilize prices, and that this lawsuit is a "sham" brought pursuant to the conspiracy in an attempt to force Rose Acre to abandon its legitimate price competition with Petitioners. The District Court bifurcated Rose Acre's amended counterclaim for a separate trial, and Petitioners' claims against Rose Acre were tried to a jury in October, 1987. *See* App. B-6 & B-49-

[1] Petitioners' Statement of the Case is improperly argumentative in the extreme. It is essentially a diatribe—and an inaccurate diatribe at that. Throughout their Statement of the Case, Petitioners distort the record, mischaracterize the opinion below, make "factual" assertions that are not supported by any competent evidence, and ignore the undisputed facts relied upon by the courts below. Accordingly, Rose Acre has undertaken here to provide the Court with an accurate Statement of the Case.

50. The jury returned a verdict for Petitioners in the amount of $9,285,634—or approximately $27.9 million after trebling, an amount that (as the Court of Appeals noted) exceeds Rose Acre's net worth. App. A-2 & A-17.

The District Court granted Rose Acre's motion for judgment notwithstanding the verdict ("JNOV") and entered judgment for Rose Acre on Petitioners' claims. App. B-1-56.[2] The Court of Appeals unanimously affirmed the District Court's judgment. App. A-1-25. Petitioners did not seek rehearing or rehearing en banc in the Court of Appeals.

B. Factual Background

Respondent Rose Acre is an egg producer and processor located near Seymour, Indiana. Rose Acre is owned by the members of the Rust family (David Rust, Lois Rust and their seven children). As an integrated producer-processor, Rose Acre maintains its own flocks of egg-laying hens (called "layers") that *produce* the eggs, which Rose Acre then *processes* at the same location for sale to its customers. App. B-11. Rose Acre's production and processing facilities are highly automated. As the Court of Appeals aptly observed: "Rose Acre's chickens practically lay their eggs on conveyer belts, which carry them away to be graded, sorted by size, and crated in a continuous operation . . . in cartons suitable for supermarket shelves . . . ." App. A-2.

Petitioners are egg processors located in Ohio and Iowa who sell eggs in competition with Rose Acre and other egg processors in various states. App. B-8-9. Unlike Rose Acre, Petitioners do not produce their own eggs. Instead, Petitioners buy their eggs from independent producers and, after processing, resell those same eggs to grocery wholesalers and retailers, or to "market facilita-

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[2] The District Court also conditionally granted Rose Acre's alternative motion for a new trial and denied Petitioners' motion for summary judgment on Rose Acre's amended counterclaim. App. B-3-4 & B-56-77. Rose Acre's amended counterclaim remains pending in the District Court.

tors" such as "breakers" (businesses that "break" the eggs for use in finished products). App. B-9-10 & n.2; *see also* App. A-2.

It is undisputed that integrated producer-processors such as Rose Acre enjoy benefits of efficiency from producing and processing eggs at a single location that are not available to nonintegrated processors such as Petitioners who buy their eggs elsewhere. App. B-11. To achieve this efficiency, Rose Acre invested $13 million to build and install new, highly automated facilities in the late 1970s and early 1980s. *See* App. A-3 & A-15; App. B-14-15. As a result, Rose Acre increased its production capacity during this period by about 127%, from less than 1.5 million layers to approximately 3.4 million layers, and increased its gross revenues from $15.6 million per year to $42.5 million per year. App. B-15; App. A-3. Nevertheless, Rose Acre's sales during the relevant period (mid-1977 to mid-1983) represented only about 1% of national egg production, and never more than 8% to 9% of egg sales in the four-state area (Ohio, Indiana, Illinois and Michigan) where Rose Acre sold most of its eggs. App. B-27; App. A-3.

During this same period, other integrated producer-processors in the midwest also grew substantially or entered the market for the first time with large integrated facilities, including companies such as Wabash Valley Produce (growing from 2 million to 3.3 million layers), Midwest Poultry Services (growing from under 1 million to 2.25 million layers), Croton Egg Farm (new entrant with 2.8 million layers) and Daylay Egg Farm (new entrant with 1.2 million layers). App. B-25-26 (quoted at App. A-5). In total, 34 different companies with 1 million or more layers each entered the U.S. egg market or grew to become major competitors between 1977 and 1983, and while not all were successful, the average growth of these companies was approximately 220% during this period. App. B-25.

As a group, Petitioners themselves also experienced significant growth in sales during this period, increas-

ing their combined gross revenues from $60 million in 1977 to over $92 million in 1983. App. B-24. In fact, as the District Court pointed out, "[d]uring the relevant period, five of the seven [Petitioners] also experienced increased sales," App. B-15, and one Petitioner "grew almost as fast as Rose Acre did during the relevant period . . . ." App. B-25.

Prior to expanding its production in the late 1970s, Rose Acre sold most of its eggs within 100 miles of Indianapolis, Indiana. App. A-3. However, as Rose Acre began producing more eggs, Rose Acre began competing with Petitioners and others for sales in Illinois, Michigan, Ohio and New York. App. A-3-4; App. B-8-9 & B-15. In particular, Rose Acre was successful in selling its eggs to ten large supermarket chains that previously bought their eggs from one of the Petitioners. App. A-3. As the Court of Appeals succinctly stated: "To do this [Rose Acre] offered low prices." *Ibid.*

Egg prices are based on supply and demand, and vary from day to day as supply and demand shift. App. B-11 & B-13. Demand for eggs is subject to seasonal variations, and supply depends on how many eggs the hens happen to lay and what grades and sizes those eggs happen to be, with each combination of grade and size having an individual supply and demand. App. B-11-12. Because producers cannot control what grades and sizes the hens produce, App. B-12, and the "[h]ens do not always cooperate by laying eggs in the grades and sizes consumers want at the moment," App. A-2, all egg producers routinely experience surpluses or shortages of particular grades and sizes of eggs.[3] Moreover, eggs are a perishable commodity with a short shelf life, and the age of the eggs affects their marketability and the prices customers will pay. *See* App. B-12 & B-48. Thus, when surpluses occur, the surplus eggs must be disposed of quickly before they become too old to sell, and to make

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[3] Altman Cr., VII Tr. 152; Peter Dep., P.Ex. 102 at 27-28; Hemmelgarn Cr., VI Tr. 77-78; D. Rust Cr., IX Tr. 65; M. Rust Dir., Supp. 7 Tr. 30-32.

room for new eggs that the hens (oblivious to market surpluses) continue to lay every day. *See* App. B-48-49. Because of these market conditions, all egg companies are sometimes forced to sell at a loss.[4] As the Court of Appeals observed: " 'sell 'em or smell 'em' is the industry motto." App. A-2.

Petitioners prefer to sell their surplus eggs in the secondary market to "breakers" rather than selling at discount prices to their regular grocery store customers. App. A-2; App. B-49. Petitioners choose this alternative even though "breakers represent the least attractive alternative to the processors as their price is customarily lower." App. B-10 n.2. One Petitioner admitted that the purpose of selling surplus eggs to breakers was to keep egg prices higher in the grocery stores. Gressel Cr., II Tr. 79-81. Another Petitioner similarly opined that it is not "[g]ood business ethics" to "disrupt the marketplace with special prices." Peter Dep., P.Ex. 102 at 29.

Rose Acre, in contrast, sold significant quantities of surplus eggs as "specials" at discount prices to its regular retail and wholesale customers. App. A-2; App. B-16-18. Petitioners objected to Rose Acre's specials, and one of them went so far as to ask Rose Acre to stop selling specials in the regular market.[5] When Rose Acre refused, this lawsuit followed.

Petitioners have alleged that Rose Acre "offered selective discriminatory prices to a few large, targeted customers." Petition 7. However, the Court of Appeals stated that "[t]he only *evidence* we could find on the subject suggested that at any given moment Rose Acre was offering the same terms to anyone who then signed on as a customer." App. A-21 (emphasis added). Petitioners have also alleged Rose Acre's prices were "below *any* conceivable cost standard . . . ." Petition 8 (emphasis

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[4] Hemmelgarn Cr., VI Tr. 88; D. Rust Dep., P.Ex. 92 at 373; Gressel Cr., II Tr. 128-29; Altman Cr., VII Tr. 152.

[5] Gressel Cr., II Tr. 52-55; *see also* Hemmelgarn Cr., VI Tr. 77-78; Boomsma Cr., VII Tr. 111-12; Altman Cr., VII Tr. 162-64.

in original). The District Court, however, found that Petitioners' "evidence" on this subject was "speculative and unreliable," App. B-40, and that "[t]he data and analysis used by [Petitioners'] experts is *inadequate* to establish that Rose Acre's pricing practices were below its costs under the appropriate cost standard." App. B-38 (emphasis added).[6]

C. The District Court Opinion

The District Court entered JNOV for Rose Acre on two separate grounds. App. B-18-49. First, the District Court held that even *assuming* Rose Acre had discriminated in price between different purchasers of commodities of like grade and quality, the evidence was insufficient to support a finding that "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 13(a) (1982). Second, the District Court held that Rose Acre's sales of surplus "specials" were exempt from the Robinson-Patman Act under the Fourth Proviso relating to "perishable goods." *Ibid.*[7]

Regarding the first ground for JNOV, the District Court held that: "In order to find liability for illegal price discrimination . . . [Petitioners] must show that

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[6] The Court of Appeals did not address this issue, but neither did it disturb the District Court's determination that Petitioners failed to prove below-cost pricing. *See* App. A, *passim.*

[7] Rose Acre also moved for JNOV on the ground that Petitioners "produced no probative evidence that Rose Acre engaged in price discrimination within the meaning of 15 U.S.C. § 13(a)." Rec. Doc. 183 at 1. The District Court did not address this question, but in granting JNOV for Rose Acre on other grounds merely *assumed* for purposes of its decision that Rose Acre had discriminated in price. *See* App. B-23. Petitioners blatantly misrepresent the record when they state: "There was no question before the trial judge or jury in the district court that Rose Acre had committed price discrimination." Petition 24 n.20. Besides being raised in Rose Acre's motion for JNOV, this deficiency in Petitioners' case was also raised in Rose Acre's trial brief (Rec. Doc. 170), motion for directed verdict (Rec. Doc. 171), and closing argument at trial (XII Tr. 46), as well as in Rose Acre's brief on appeal.

a competitive injury resulted from any differences in price." App. B-22. The District Court stated that Petitioners could establish competitive injury "by either showing: '1) actual competitive injury shown by market analysis; [or] 2) predatory intent from which competitive injury may be inferred.'" *Ibid.* (brackets in original; quoting *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982)).

On the subject of actual injury to competition, the District Court found that: "The evidence presented at the trial of this cause is not sufficient to find actual competitive injury in the egg market." App. B-23. To the contrary, the District Court held (at App. B-26-30) that:

> Even the most favorable viewing of the evidence in favor of the [Petitioners] indicates a healthy, competitive market, marked by the growth of the [Petitioners] and the entry and growth of other egg processors in the area. The contention that Rose Acre's expansion and growth harmed competition during this period is untenable. The evidence is insufficient to support any such contention.
>
> Nor was there any evidence of the trend toward monopolization of the market by Rose Acre. . . .
>
> Never in the short run or long run did Rose Acre ever dominate the egg market. Nor was there a time when Rose Acre could increase its prices to benefit from alleged predatory pricing. Rose Acre made a profit every year except one during the years in question which belies the charge of selling eggs before [sic] cost.
>
> . . . Given the economic realities of the egg industry, particularly the ½ cent to 1 cent per dozen eggs profit margin available to processors, it would have been impossible for Rose Acre to effectively control prices in the market. Had Rose Acre attempted to raise its prices at any time during that period to effectively use its 'monopoly power,' any number of processors would have sold under the inflated price to sell eggs in line with the market.

The District Court held that Petitioners could still prevail, however, "if there is sufficient evidence of Rose Acre's predatory intent from which competitive harm may then be inferred." App. B-30. The court said that such "predatory intent may be proven by showing either express evidence of predatory intent or the inference of predatory intent by showing pricing below cost." App. B-30-31 (citing *O. Hommel*, 659 F.2d at 347).

The District Court specifically analyzed Petitioners' purported evidence of express predatory intent, App. B-31-33, and held that the evidence was insufficient to establish predatory intent because it merely indicated "that Rose Acre intended to compete aggressively . . . ." App. B-32. The District Court held that Petitioners also "failed to produce sufficient evidence to support a finding that Rose Acre priced below cost." App. B-38.[8] Therefore, the District Court concluded that: "Because the evidence presented at trial is insufficient to establish that a competitive injury resulted from any difference in price charged by Rose Acre, the verdict for [Petitioners] cannot stand." App. B-46.

Alternatively, the District Court held that judgment for Rose Acre "is also warranted under the 'perishability defense' contained in the [Fourth Proviso of the] Robinson-Patman Act . . . ." App. B-47. The District Court based this alternative holding on uncontradicted evidence which established that "[t]he eggs produced by

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[8] Petitioners argued in the District Court that the relevant cost standard should be the long-run incremental cost ("LRIC") to Rose Acre of producing the additional or surplus eggs created by Rose Acre's expansion. App. B-33-38 & n.6. Based on a detailed analysis of the expert testimony offered by Petitioners, the District Court held that: "The data and analysis used by [Petitioners'] experts is inadequate to establish that Rose Acre's pricing practices were below its costs under the appropriate cost standard [LRIC]." App. B-38; *see also* App. B-38-45 (finding Petitioners' expert's testimony on this subject "speculative and unreliable" and "completely useless"). Accordingly, the District Court held that: "The jury could not properly infer from this evidence that Rose Acre sold eggs below its long-run incremental costs." App. B-45.

Rose Acre had to be distributed under the compulsion of perishability." App. B-49. Thus, the District Court held that: "Rose Acre's sales of eggs to retailers and wholesalers at special prices during the relevant period rather than to market facilitators [are] protected by the Fourth Proviso of the Robinson-Patman Act." *Ibid.*

D. The Court Of Appeals Opinion

The Seventh Circuit Court of Appeals unanimously affirmed the District Court's judgment for Rose Acre. Although acknowledging that Petitioners' claims were brought solely under the Robinson-Patman Act, the Court of Appeals first analyzed Petitioners' claims under a Sherman Act § 2 (15 U.S.C. § 2) attempted monopolization standard. App. A-2 & A-6-15. In performing this analysis, the court identified three approaches that have been used in attempting to distinguish legitimate competitive pricing from predatory pricing violative of the Sherman Act: (1) determining "whether the defendant's prices exceed its costs"; (2) "concentrat[ing] on the defendant's intent"; and (3) "look[ing] at the back end, the 'high price later' part of the predatory sequence." App. A-7-9. As among these three approaches, the Court of Appeals indicated (at App. A-9-10) that:

> Contemporary cases strongly favor using this third approach whenever possible. The two most recent predatory pricing cases in the Supreme Court, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), employ it, each holding that recoupment would be so unlikely that antitrust inquiry could not be justified. So too with our own most recent decision on point, *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989).

Applying the principles enunciated in *Matsushita* and *Cargill* to the facts presented here, the Court of Appeals concluded that Rose Acre could not have been liable under Sherman Act § 2, stating that:

> Our review of the record leads us to agree with the district court that no rational jury could have found that recoupment took place, could have taken place, or conceivably could take place in the future. To the contrary, the overwhelming impression left by this record is that Rose Acre beat its rivals to the punch in automating production and used its lower costs to take business away from them. New entrants with modern technology have flourished; stodgy firms have stagnated. This is what competition is all about, and to penalize it in the name of antitrust would do a great disservice to consumers.

App. A-15.[9]

Nevertheless, the Court of Appeals stated that: "To conclude that Rose Acre did not engage in predatory pricing is not necessarily to absolve it under the Robinson-Patman Act." App. A-15. The Court of Appeals observed that in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), this Court "held that the firm taking the lead in reducing prices may be liable [under the

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[9] Regarding the other methods for determining predation, the Court of Appeals stated that: "Only if market structure makes recoupment feasible need a court inquire into the relation between price and cost." App. A-10. In addition, the court said that: "Making likelihood of recoupment the initial hurdle avoids not only questions of cost but also questions of intent, for if a price below cost is lawful when it cannot lead to monopoly, then the defendant's state of mind becomes irrelevant." *Ibid.* Moreover, the Court of Appeals found (as had the District Court) that the specific "evidence" of alleged predatory intent cited by Petitioners did not establish predatory intent at all, but merely showed that Rose Acre was acting as a vigorous competitor. App. A-11-12. Furthermore, following *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983), the Court of Appeals stated that because "[i]ntent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition . . . [and] also complicates litigation . . . , we now hold that intent is not a basis of liability (or a ground for inferring the existence of such a basis) in a predatory pricing case under the Sherman Act." App. A-12-13 (disagreeing with *McGahee v. No. Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2110 (1989), and "occasional, similar, decisions elsewhere").

Robinson-Patman Act] on account of a 'drastically declining price structure' in a 'highly competitive' market." App. A-19 (quoting *Utah Pie*, 386 U.S. at 703). Thus, despite the fact that " 'ordinary' antitrust standards suggest giving Rose Acre a medal rather than requiring it to pay $28 million in damages," the Court of Appeals concluded that "Robinson-Patman cases, for now at least, follow the approach of *Utah Pie*." App. A-17-18.[10]

However, the Court of Appeals found it unnecessary to decide whether Petitioners had shown sufficient competitive harm under *Utah Pie* because the court held that Petitioners failed to meet their burden of proof on the first essential element of their case, namely, "price *discrimination*, as the Robinson-Patman Act uses that term." App. A-20 (emphasis in original). First, the Court of Appeals held that Petitioners erroneously confused *economic* price discrimination with *legal* price discrimination. The court said (at App. A-20) that:

> This puts a big hole in [Petitioners'] case, because [Petitioners' expert] Professor Mueller testified that Rose Acre engaged in three kinds of price discrimination, of which the first was charging the same price to customers in different cities. Economic price discrimination this undoubtedly was; legal price discrimination it just as surely was not. Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* 87-99 (1962).

Second, the Court of Appeals held that Petitioners' evidence was insufficient because it ignored the critical fact that Rose Acre's prices to different customers were set at different times. The court stated (at App. A-21):

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[10] Specifically, the Court of Appeals noted that *Utah Pie* "recited that 'predatory intent' coupled with 'unreasonably low prices' may be the basis of liability [under the Robinson-Patman Act], . . . so our conclusion that resort to intent under § 2 of the Sherman Act creates substantial prospect of injury to competition and needlessly complicates litigation does not support a judgment *in this court* taking intent outside the pale of Robinson-Patman litigation." App. A-19 (emphasis in original; citation omitted).

> Whether Rose Acre engaged in price discrimination as the Robinson-Patman Act uses that term depends on whether it charged the same price to customers at the same time. *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 806 (9th Cir. 1969). Prof. Mueller did not address that question. The only evidence we could find on the subject suggested that at any given moment Rose Acre was offering the same terms to anyone who then signed on as a customer.

Third, the Court of Appeals held that Petitioners failed to prove any difference in Rose Acre's mean prices to different customers after prices for specials were blended with prices for non-specials. The court explained (at App. A-22, emphasis in original) that:

> Whether price discrimination has occurred depends . . . on the price *after* all discounts, specials, and so on. *See Fruitvale Canning Co.*, 52 F.T.C. 1504, 1520 (1956); Julian O. von Kalinowski, *4 Antitrust Laws and Trade Regulation* § 27.03[2] (1988 ed.) (collecting sources).
>
> Asked at trial whether he had computed the mean price paid by customers after blending in the specials, Dr. Mueller said no. . . . Asked at oral argument whether it would be possible to whip up the blended price from the record, counsel for [Petitioners] said only that Rose Acre's pricing information was there—in carton upon carton full of forms. [Petitioners] did not try to use this information; the jury did not have it; we could not derive it without Herculean labors.

Fourth, the Court of Appeals held that Petitioners failed to present any evidence to carry their burden of proving that Rose Acre's specials were of "like grade and quality" compared to its other sales. App. A-22-23. The court said that Petitioners' expert "needed to account for the fact that some, perhaps most, of the specials were not 'like' eggs sold on long-term contract; he did not." App. A-23.

Thus, the Court of Appeals concluded that: "For all we can tell—for all the jury could have told—Rose Acre

offered uniform blended prices to customers at any particular time for like-quality goods. [Petitioners] failed to prove an essential element of their case, and the judgment is therefore AFFIRMED." App. A-23-24.

SUMMARY OF ARGUMENT

This is a highly complex, fact-intensive antitrust action in which both the District Court and the Court of Appeals, after reviewing the evidence in the light most favorable to Petitioners, unanimously held that Petitioners failed to present sufficient evidence to support their claims. The Petition in this case essentially asks this Court to conduct yet another de novo review of the evidence and to reverse the evidentiary assessments made by both courts below. In some instances, the fact-bound nature of the inquiry is evident from the Petition itself. Petitioners' Question 3, for example, not only asks this Court to review a routine sufficiency-of-the-evidence question, but to do so would require this Court to sift through box after box of business records in search of purported "evidence" of price discrimination that neither Petitioners nor their expert have ever identified and that, in reality, simply does not exist.

In other instances, Petitioners have attempted to disguise the fact-sensitive nature of the questions presented by misstating the record and mischaracterizing the opinion below. Petitioners' Questions 1(a)-(c) are prime examples. All three questions are premised on assertions of purported "fact" that are not supported by the record and, indeed, are contrary to evidentiary determinations made by the courts below. *See infra* at 18-21. Moreover, all three questions are based on a gross mischaracterization of the Court of Appeals' opinion in which Petitioners confuse the Court of Appeals' analysis of predatory pricing under Sherman Act § 2 with the Court of Appeals' separate discussion of the Robinson-Patman Act.

Petitioners' Question 2 (relating to the "perishable goods" exemption in the Robinson-Patman Act) is even farther afield. Here Petitioners have asked this Court

to review a uniquely fact-sensitive issue that was not addressed by the Court of Appeals, and that was relied upon by the District Court only as an alternative ground for its decision.

In sum, the Petition does not present any issue worthy of this Court's consideration or even remotely suitable for this Court's certiorari jurisdiction. Resolution of the questions presented by this Petition would require this Court to conduct a de novo review of the extensive record in this case in order to determine a whole series of sufficiency-of-the-evidence questions, including: (1) whether Petitioners presented sufficient evidence of price discrimination; (2) whether the evidence is sufficient to support Petitioners' contention that the egg market is an "oligopoly"; (3) whether Petitioners presented sufficient evidence that Rose Acre's prices were below long-run incremental cost; (4) whether Petitioners presented any probative evidence of subjective predatory intent; and (5) whether the evidence establishes that Rose Acre's specials were distributed under the compulsion of perishability. The District Court and the Court of Appeals have both reviewed this evidence in the light most favorable to Petitioners, and both courts have held that the evidence is insufficient to support a verdict in Petitioners' favor.

The decisions below are based on sound reasoning and, though resting on different grounds, arrive at the same definitive conclusion: that Rose Acre did not violate the antitrust laws by selling its eggs at competitive prices, and that "to penalize [Rose Acre] in the name of antitrust would do a great disservice to consumers." App. A-15; *see also* App. B *passim*. In a largely transparent effort to create the illusion of injustice below, Petitioners have misstated the facts, mischaracterized the opinion below and, as a final act of desperation, launched an unjustified personal attack on the author of the Court of Appeals' opinion (Judge Easterbrook). This is hardly the stuff of which a Supreme Court case is made.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' QUESTIONS 1(a)-(c) ARE BASED ON A MISCHARACTERIZATION OF THE COURT OF APPEALS' OPINION AND ON ASSERTIONS OF PURPORTED "FACT" THAT ARE NOT SUPPORTED BY THE RECORD. IN ANY EVENT, THESE QUESTIONS DO NOT PRESENT ANY ISSUE MERITING REVIEW BY THIS COURT.

A. Petitioners' Questions 1(a)-(c) Are Based On An Inaccurate Portrayal Of The Decision Below.

The first reason why certiorari should not be granted to review Petitioners' Questions 1(a)-(c) is that these questions do not belong in this case. All three questions are based on an inaccurate portrayal of the Court of Appeals' decision. Specifically, Petitioners have premised their questions on the misguided contention that the Court of Appeals adopted "monopolistic recoupment" as the "exclusive" basis for evaluating harm to competition under *both* Sherman Act § 2 and the Robinson-Patman Act. From this erroneous premise Petitioners argue that the Court of Appeals "abolish[ed] both predatory intent and pricing below cost as means to establish harm to competition," Petition 10, and that "such a construction nullifies the Robinson-Patman Act." *Id.* 12. The Court of Appeals did nothing of the sort.

First of all, the Court of Appeals did *not* adopt "monopolistic recoupment" as the *sole* basis for evaluating predatory pricing cases under either the Sherman Act or the Robinson-Patman Act. Rather, the Court of Appeals merely recognized that, in evaluating predatory pricing claims *under Sherman Act § 2*, the economic plausibility approach employed in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-95 (1986), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119-21 nn.15-17 (1986), should be used as a "filter" to identify those cases where successful predation is "so unlikely that antitrust inquiry could not be justified." App. A-9-10. In doing so, the Court of

Appeals did *not* reject all cost-based tests, as Petitioners spuriously contend. On the contrary, the Court of Appeals expressly recognized that one way to detect possible predation "is to find out whether the defendant's prices exceed its costs." App. A-7. The Court of Appeals concluded, however, that market structure should be examined first, because "[o]nly if market structure makes recoupment feasible need a court inquire into the relation between price and cost." App. A-10. As discussed below, this threshold examination of market structure is fully consistent with this Court's decisions in *Matsushita* and *Cargill*. *See infra* at 22-23. It is also fully consistent with decisions in every circuit that thus far has had occasion to apply the *Matsushita* economic plausibility test.[11]

Nor is there any basis for Petitioners' contention that the Court of Appeals imposed any kind of "monopolistic

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[11] *See Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1255-56 (5th Cir.) (holding that "[w]ithout an economically plausible theory of anticompetitive effect, Stitt was not entitled to reach the jury on the predatory-pricing claim," and affirming a directed verdict for defendant where the evidence did not support an "economically plausible inference" that defendant could ultimately raise prices above competitive levels), *cert. denied*, 109 S. Ct. 224 (1988); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 599-600 (8th Cir. 1987) (affirming summary judgment for defendant GF where market circumstances "strongly suggest that predatory pricing by GF would not be rational economic behavior"), *cert. denied*, 484 U.S. 1010 (1988); *Morristown Block and Concrete Prod. Co. v. General Shale Prod. Co.*, 829 F.2d 39 (6th Cir. 1987) (unpublished opinion), *aff'g per curiam*, 660 F. Supp. 429, 432 (E.D. Tenn. 1986) (summary judgment granted for defendant where "it does not make economic sense in this case for [defendant] to engage in predatory pricing"); *also Metro Mobile CTS, Inc. v. New Vector Communications, Inc.*, 892 F.2d 62, 1989-2 Trade Cas. (CCH) ¶ 68,878 at 62,629 (9th Cir., Dec. 20, 1989) (affirming summary judgment for defendant and citing *Matsushita* for the proposition that "[b]ecause the barriers to entry were concededly low, it was virtually impossible for [defendant] to exercise control over price for an extended time"); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1415-16 (7th Cir. 1989) (cited at App. A-10).

recoupment" requirement *under the Robinson-Patman Act*. The Court of Appeals' discussion of "monopolistic recoupment" is confined to the court's analysis under Sherman Act § 2. Likewise, the Court of Appeals' conclusion that evidence of subjective intent "does not help to separate competition *from attempted monopolization*," App. A-12 (emphasis added), is expressly limited to the Sherman Act. App. A-13 (stating that "intent is not a basis of liability . . . in a predatory pricing case *under the Sherman Act*") (emphasis added). As for the Robinson-Patman Act, the Court of Appeals acknowledged that *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), "took a different view of things." App. A-16. Accordingly, the Court of Appeals held that in Robinson-Patman cases, as opposed to Sherman Act cases, " 'predatory intent' coupled with 'unreasonably low prices' may be the basis of liability." App. A-19 (quoting *Utah Pie*, 386 U.S. at 696 n.12).[12]

Thus, an accurate reading of the Court of Appeals' decision dissolves at least three of Petitioners' arguments at the outset. First, it exposes as frivolous Petitioners' contention that the Seventh Circuit has done away with all cost-based tests for predatory pricing cases, and at the same time refutes Petitioners' attempt to portray the decision below as somehow inconsistent with cases from other circuits.[13] Second, it reveals that there is absolutely

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[12] The question of whether *Utah Pie* is still good law is *not* presented by this Petition. In fact, to the extent this question was resolved below, it was decided in Petitioners' favor and, therefore, cannot reasonably be raised by Petitioners as a basis for certiorari. Furthermore, because the Court of Appeals rested its judgment on an entirely separate ground (*i.e.*, Petitioners' failure to prove price discrimination), the Court of Appeals' discussion of *Utah Pie*—indeed, its entire discussion of harm to competition under the Robinson-Patman Act—is purely dictum. *See infra* at 21.

[13] As for the Fifth, Sixth, Eighth and Ninth Circuits, *see supra* note 11. Nor is the Seventh Circuit's opinion in this case in conflict with the cases cited as Petition 15-16 n.11. All but six of those cases were decided prior to this Court's 1986 decision in *Matsushita*, which laid the groundwork for the economic plausibility test. In

no basis for Petitioners' contention that the Seventh Circuit disregarded *Utah Pie*; on the contrary, the court took the view of *Utah Pie* most favorable to Petitioners. And third, it evaporates Petitioners' disingenuous contention that the Seventh Circuit has somehow "nullified" the Robinson-Patman Act.

B. Petitioners' Questions 1(a)-(c) Are Based On Assertions Of Purported "Fact" That Are Not Supported By The Record, And That Would Require This Court To Engage In An Extensive De Novo Review Of The Voluminous Record In This Case.

Petitioners' Questions 1(a)-(c) suffer from another, equally fatal defect. All three questions are based on "factual" assertions that are not supported by the record.

Question 1(a), for example, is based on the unsupported factual premise that the egg market is an "oligo-

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five of the six post-*Matsushita* cases, the courts expressly recognized that in addition to below-cost pricing, the alleged predator must also have the capability to succeed in a predatory pricing scheme by recouping its losses through higher prices later. *See C.A.T. Indus. Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 884 F.2d 209, 211 (5th Cir. 1989) (per curiam) (recognizing that "inherent in a predatory pricing scheme is the predator's need to recoup losses through subsequent higher prices," and affirming summary judgment for the defendant where "it is unlikely that [defendant] would be able to control prices for any meaningful period, because other competitors easily can enter the market"); *Clamp-All Corp. v. Cast Iron Soil Pipe Instit.*, 851 F.2d 478, 483 (1st Cir. 1988) (citing *Matsushita*), *cert. denied*, 109 S. Ct. 789 (1989); *McGahee v. No. Propane Gas Co.*, 858 F.2d 1487, 1501-02 (11th Cir. 1988) (discussing *Matsushita* and *Cargill*), *cert. denied*, 109 S. Ct. 2110 (1989); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344-46 (8th Cir. 1987) (discussing *Matsushita*); *Instructional Systems Dev. Corp. v. Aetna Cas. and Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987) (recognizing that defendant must be able through "short term price cutting to secure long term monopoly profits"). In the sixth case, *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989), there was no allegation of below-cost pricing and thus no need to decide whether predation was plausible.

poly." *See* Petition i & 10-13. This startling contention is not only contrary to the uncontested evidence in this case, it is patently absurd. There are literally hundreds of egg processors in the United States and, according to the most recent statistics in the record, more than 150 egg processors in Indiana, Ohio, Illinois and Michigan alone. *See* P.Ex. 52-14ee. Moreover, during the period relevant to this action, the number of major producer-processors (those with one million or more layers) actually *increased* from 34 in 1977 to 56 in 1983. *See* P.Exs. 32-36. As Petitioners note: "'An oligopoly market is one in which a few relatively large sellers account for all or the bulk of the output." Petition 11 n.5 (quoting II P. Areeda & D. Turner, *Antitrust Law* ¶ 404 at 272 (1978)). Petitioners do not define what they mean by "a few." But whatever it means, a market with hundreds of sellers plainly cannot be it.[14]

Likewise, Petitioners' Question 1(b) is premised on the unsupported factual contention that Rose Acre acted with "predatory intent." Here, Petitioners conveniently ignore the fact that both the District Court and the Court of Appeals found Petitioners' evidence *insufficient* to support a finding of predatory intent. App. B-31-33; App. A-11-12. Both courts below ruled that the evidence merely established that Rose Acre was acting as a legitimate competitor, and simply "beat its rivals to the punch in automating production" and used its lower costs to offer more competitive prices. App. A-15.

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[14] Petitioners' attempt to portray the egg market as an oligopoly is also flatly refuted by the District Court's finding that: "Even the most favorable viewing of the evidence in favor of [Petitioners] indicates a healthy, competitive market . . . ." App. B-26. Petitioners' contention is further refuted by the undisputed fact that prices in the egg market vary from day to day based on supply and demand. In contrast, "[t]he characteristic feature of oligopoly is price rigidity. Changes in published prices are made relatively infrequently, and then only in response to relatively substantial or prolonged changes in demand or costs." II P. Areeda & D. Turner, *supra* ¶ 404b3 at 276-77.

Similarly, Petitioners' Question 1(c) is based on the mythical contention that the record contains "extensive proof of below-cost pricing," Petition 17, and that this purported evidence "would have prevailed under *any* cost-price measure . . . ." *Id.* 18 (emphasis in original). Once again, the District Court held otherwise. The District Court held that Petitioners' evidence on below-cost pricing was "speculative and unreliable," App. B-40, and therefore was *insufficient* to support Petitioners' contention that Rose Acre priced its eggs below cost. App. B-38-47.[15] The Court of Appeals did not disturb the District Court's holding on this point.

Thus, despite Petitioners' effort to cast their Questions 1(a)-(c) as if they were questions of law, this is simply not the case. Inherent in each question is a factual premise that is not supported by the record. Moreover, to review these questions this Court would necessarily become embroiled in an extensive de novo review of the voluminous record in this case to determine whether there is sufficient evidence to support Petitioners' contentions. This is not the type of question suitable for this Court's certiorari jurisdiction, nor is it worthy of this Court's time and attention, especially since two courts below already have reviewed Petitioners' evidence and found it to be insufficient. *See, e.g., Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924) (writ dismissed where original certiorari papers failed to

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[15] The "evidence" of alleged below-cost pricing cited in the Petition is the same "evidence" the District Court found insufficient to show that Rose Acre priced its eggs below long-run incremental cost (LRIC). Even though Petitioners argued in the District Court in favor of LRIC as the appropriate cost standard, Petitioners now claim (somewhat belatedly) that Rose Acre also priced its eggs below average variable cost ("AVC"). Petition 8 & 17-18. This is a specious contention. First of all, Petitioners' purported "evidence" of below-AVC pricing is as deficient as their purported "evidence" of below-LRIC pricing. Second, since AVC is a *lower* measure of cost than LRIC, the District Court's determination that Petitioners failed to prove pricing below LRIC necessarily means that Petitioners also failed to prove pricing below AVC.

disclose underlying sufficiency-of-the-evidence questions). This Court has frequently cautioned that: "We do not grant a [writ of] certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *accord NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting the denial of certiorari). Yet, that is exactly what Petitioners' Questions 1(a)-(c) would require this Court to do.

C. Petitioners' Questions 1(a)-(c) Do Not Present Any Issue Meriting Review.

In any event, no matter how the questions are framed, and no matter what they assume, Petitioners' Questions 1(a)-(c) do not raise any issue meriting review by this Court. To begin with, these questions have nothing to do with the basis for the Court of Appeals' *judgment* in this case. Although the Court of Appeals' *opinion* discusses predatory pricing under the Sherman Act and harm to competition under the Robinson-Patman Act at some length, App. A-6-19, the Court of Appeals' *judgment* squarely rests on only one, entirely unrelated ground: the absence of any evidence to prove price discrimination. App. A-20-24. Everything else "is plainly dictum, presenting nothing reviewable by this Court." *Stickel v. United States*, 76 S. Ct. 1067, 1068 (1956) (Harlan, J., on application for stay); *see also Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions"); *accord Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).[16]

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[16] This is especially true of the Court of Appeals' discussion of the Sherman Act (App. A-7-15) inasmuch as no Sherman Act claim has ever been made in this action and none is being made now. Petitioners' claims in the District Court (App. B-5-6), in the Court of Appeals (App. A-2), and in this Court are based solely on the Robinson-Patman Act. *See* Petition 2-3, 6 & 8. Indeed, the Robinson-Patman Act is the only statute cited by Petitioners as a "Statutory Provision Involved" in this Petition. *Id.* 2-3.

This alone is a sufficient basis for declining review of Petitioners' Questions 1(a)-(c). But even if one were to overlook this basic tenet of Supreme Court jurisprudence, there is still nothing presented here that merits this Court's attention. Most of Petitioners' arguments on this subject are devoted to lambasting the Court of Appeals' use of an economic plausibility test (what Petitioners call a "monopolistic recoupment" test) in analyzing Petitioners' predatory pricing allegations under a Sherman Act § 2 standard.[17] From reading the Petition, one would think that this approach was invented by the Seventh Circuit and applied for the first time in recorded history in this case. That is far from accurate. In fact, the approach taken by the Court of Appeals in this case is merely an application to these specific facts of the principles set out by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-95 (1986), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119-21 nn. 15-17 (1986).

In *Matsushita*, this Court recognized that predatory pricing schemes are "inherently uncertain" and for that reason "are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589; *accord Cargill*, 479 U.S. at 121 n.17. "Moreover, the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition." *Cargill*, 479 U.S. at 121 n.17 (citing *Matsushita*, 475 U.S. at 594). "Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Accordingly, this Court held in *Matsushita* and reaffirmed in *Cargill* that predatory pricing could not be inferred where "economic realities" are such that there could be

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[17] As previously discussed, Petitioners erroneously assert that the Court of Appeals also applied a "monopolistic recoupment" standard under the Robinson-Patman Act. This is simply a mischaracterization of the Court of Appeals' opinion. *See supra* at 16-17.

no "reasonable expectation" of succeeding in a predatory pricing scheme. *Matsushita*, 475 U.S. at 595 & 589; *accord Cargill*, 479 U.S. at 119 n.15 ("Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme").

Contrary to the impression Petitioners attempt to create, there is no "confusion" (let alone "total chaos") in the lower courts regarding either the meaning or effect of the *Matsushita* economic plausibility requirement. As the Eighth Circuit has succinctly stated: "In essence, *Matsushita* imports a rule of impossibility into predatory pricing cases: if the defendant could not have captured the market, its conduct cannot be predatory, no matter what its 'intent.'" *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1345 (8th Cir. 1987). And that is exactly how *Matsushita* has been uniformly applied, both in the Seventh Circuit and in every other circuit in which the issue has arisen. (*See* cases cited *supra* note 11.)[18]

Petitioners also argue that this Court should grant review to resolve a disagreement between the First and Seventh Circuits, on the one hand, and the Eleventh Circuit, on the other hand, as to the relevance of subjective intent in a Sherman Act § 2 predatory pricing case. See App. A-13 (discussed *supra* note 9). Petitioners, however, do not make much of this issue, and for good reason. The resolution of this question is wholly irrelevant to the outcome of this case. No matter how the Court might rule on this question, the result remains the same: Rose Acre wins and Petitioners lose.

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[18] The only "confusion" in the lower courts relates to an entirely different question, and one that is *not* presented here: the question of what measure of cost should be used in applying a cost-based test for predatory pricing claims. *See Matsushita*, 475 U.S. at 585 n.8 (referring to the "debate" on this question, but finding it unnecessary to resolve the debate). Petitioners acknowledge that this question is not presented by this case, Petition 17 & n.14, and Rose Acre agrees (albeit for different reasons).

First, as previously indicated, the Seventh Circuit's comment that it agrees with *Barry Wright*, and thus disagrees with *McGahee* (see *supra* note 9), is limited to claims under Sherman Act § 2—a claim that Petitioners did not pursue in the District Court and are not pursuing in this Court either. *See supra* at 21 & note 16. Thus, this issue is not even raised on the record in this case. Second, the District Court and the Court of Appeals both found in any event that Petitioners failed to present sufficient evidence to support a finding of predatory intent. *See supra* at 8, 10 n.9 & 19. Third, the question of subjective intent is rendered irrelevant in this case by the District Court's and the Seventh Circuit's concurrent findings that Rose Acre could not possibly have succeeded in raising egg prices through a predatory pricing scheme. *See supra* at 7 & 10. Therefore, under *Matsushita* and *Cargill*, Petitioners' predatory pricing claim must be rejected as economically implausible regardless of Rose Acre's "intent." *See, e.g., Henry*, 809 F.2d at 1345 (if defendant could not have captured the market, defendant's intent is irrelevant); App. A-10 ("Making likelihood of recoupment the initial hurdle avoids . . . questions of intent"). And fourth, no court—not even the Eleventh Circuit in *McGahee*—has held that liability for predatory pricing can be based *solely* on evidence of subjective predatory intent. The plaintiff still has to prove that the defendant's prices were below the appropriate measure of cost. *See McGahee*, 858 F.2d at 1503. In this case Petitioners failed to present sufficient evidence to support a finding that Rose Acre priced its eggs below the cost measure (LRIC) Petitioners themselves advocated as the appropriate standard. *See supra* at 8 & note 8.

Thus, in the context of this case, the question of whether subjective intent evidence should be considered in a Sherman Act § 2 predatory pricing case is purely academic. "But this Court does not sit to satisfy a scholarly interest in such issues." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955)

(Frankfurter, J., writing for the Court). As aptly stated in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959), "this Court decides questions . . . in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the issue] . . . can await a day when the issue is posed less abstractly."

Furthermore, Petitioners have made absolutely no showing that this issue is of sufficient *importance* to justify review, or that the Eleventh Circuit's disagreement with the First and Seventh Circuits on this narrow, esoteric matter otherwise represents an "intolerable" conflict. *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* §§ 4.3 & 4.4 at 196 & 199-200 (6th ed. 1986). Because predatory pricing is such a rare occurrence to begin with, *see Matsushita*, 475 U.S. at 589, and because the vast majority of cases that do get litigated ultimately are decided on grounds unrelated to subjective intent (this case being a good example), it will be the rare case indeed in which the result is likely to be influenced one way or the other by what is essentially an evidentiary question that is bound to vary in application from case to case and from district judge to district judge anyway. Moreover, the number of cases in which courts are even called upon to address questions of intent will likely be reduced further as more courts apply the *Matsushita* economic plausibility test as a threshold mechanism for identifying those cases in which predation is plainly implausible. This Court "must necessarily confine itself to those [issues] which reflect the more important legal problems within the realm of its jurisdiction." R. Stern, E. Gressman & S. Shapiro, *supra* § 4.11 at 212. This is not one of those questions.

Finally, the Seventh Circuit's conclusion that statements of subjective intent are not a sound basis for imposing liability in predatory pricing cases under Sherman Act § 2 is absolutely correct. The line between

statements of legitimate competition and unlawful predation is not merely fuzzy, it is nonexistent. This view is supported both by the First Circuit's cogent reasoning in *Barry Wright*, 724 F.2d at 232, and by leading antitrust scholars.[19] This is precisely the type of question where additional thought and experience in the crucible of actual trials should prove beneficial and, ultimately, should cause any disagreement to disappear entirely.

II. PETITIONERS' QUESTION 2 SEEKS REVIEW OF A FACT-SPECIFIC QUESTION THAT WAS NOT ADDRESSED BY THE COURT OF APPEALS AND DID NOT FORM THE BASIS FOR THE COURT OF APPEALS' DECISION.

Petitioners' Question 2 is similar to Petitioners' Questions 1(a)-(c) in that here, too, Petitioners are seeking review of a fact-sensitive question based on the specific evidence presented in this case. Indeed, Petitioners' Question 2—"Whether Eggs And Other Grocery Commodities With A Limited Shelf Life Are Exempt From The Robinson-Patman Act" [20]—is inappropriate for review on yet another level since this issue was not discussed at all by the Court of Appeals and was cited by the District Court only as an alternative basis for its decision.

This Court has frequently stated that: "We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981); *see also Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971). Given the intensely fact-bound nature of the issue (*i.e.*, whether the evidence presented at trial established that Rose Acre's specials had to be distributed under the compulsion of perishability), coupled with the fact that both the Court of Appeals' and the District Court's judgments soundly rest on addi-

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[19] *See, e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 714.2c at 564 (1989 Supp.); J. von Kalinowski, *Antitrust Report* 7 (Sept. 1989).

[20] Petition 18 (heading II).

tional independent grounds, this would "be a poor case in which to depart from that practice." *J. Truett Payne*, 451 U.S. at 568.[21]

III. PETITIONERS' QUESTION 3 IS A ROUTINE SUFFICIENCY-OF-THE-EVIDENCE QUESTION HAVING NO IMPORTANCE TO ANYONE OTHER THAN THESE PARTIES.

Finally, Petitioners' Question 3 asks this Court to review the question of whether Petitioners presented sufficient evidence of price discrimination to support their Robinson-Patman Act claim. See App. A-20-24. This is the very model of a question whose "review would be of no importance save to the litigants themselves." *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (vacating improvident grant of certiorari). The essence of Petitioners' Question 3 is stated in the last line of their argument, where Petitioners maintain that: "The Seventh Circuit's radical *disregard for the evidence* of record mandates review by this Court." Petition 24 (emphasis added). But as previously indicated, this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *Johnston*, 268 U.S. at 227. "Nor does it

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[21] Petitioners vainly attempt to tie this issue into the Court of Appeals' decision by intermingling two analytically distinct matters: (1) the District Court's alternative holding based on the "perishable goods" exemption in the Fourth Proviso (App. B-47-49); and (2) the Court of Appeals' discussion of the "like grade and quality" requirement that is part of Petitioners' prima facie case under the Robinson-Patman Act (App. A-22-23). See Petition 18-22. These are two entirely separate issues. Nevertheless, Petitioners try to collapse them (or at least create the appearance of collapsing them) by repeatedly referring to the "decisions below" and the "opinions below" as if both opinions deal with the same issue when, in fact, they do not. *Id.* 19 & 20. Petitioners also try to tie the two questions together by arguing that the Court of Appeals' discussion of the "like grade and quality" requirement "reverses the statutory burden of proof" under the Robinson-Patman Act. *Id.* 18. Even though this is a case about eggs, Petitioners are mixing apples and oranges. The burden of proving "like grade and quality" belongs to the plaintiff; the burden of proving the perishability defense is the defendant's.

sit for the benefit of the particular litigants." *Rice*, 349 U.S. at 74.

Adherence to the Court's normal practice of declining to review questions of this nature is particularly appropriate in this case where, despite numerous opportunities, Petitioners *still* have not come forth with evidence of even a single instance of actionable price discrimination. Instead, Petitioners have continued to rely on vague references to unspecified "business records" and so-called "expert" testimony that, upon analysis, actually demonstrate nothing of any legal significance. *See* Petition 23. The Court of Appeals, quite correctly, was unwilling to shoulder Petitioners' burden of proof for them.

Petitioners do not—and in good faith cannot—question the *legal* principles relied upon by the Court of Appeals. The legal principles cited by the Seventh Circuit are hornbook law that have not changed for decades. *See* App. A-20-22 (and authorities cited there). The Seventh Circuit's opinion neither adds to nor varies these long-standing principles of law. It simply applies them to the specific evidence presented in this case.

Furthermore, there is absolutely no merit to Petitioners' strained efforts to portray the Court of Appeals' decision in this case as somehow "creating a *per se* exception" from the Robinson-Patman Act for perishable goods. Petition 19. The Court of Appeals merely stated that Rose Acre's specials "were *not necessarily* the same grade and quality as Rose Acre's other sales." App. A-22 (emphasis added). And because the Petitioners had the burden of proving under the Robinson-Patman Act that the eggs were "of like grade and quality," 15 U.S.C. § 13(a) (1982), the court held that Petitioners "needed to account for the fact that some, perhaps most, of the specials were not 'like' eggs sold on long-term contract." App. A-23. It was Petitioners' failure to present any evidence whatsoever on this element of their case—not any *per se* rule of law—that, among the many other

deficiencies in Petitioners' evidence, led to judgment in Rose Acre's favor.

Petitioners' failure to sustain their burden of proof in this case has nothing to do with the way Rose Acre kept its records (an excuse Petitioners tried to use in the Court of Appeals). It has everything to do with the fact that Rose Acre did nothing wrong. The alleged "evidence" of price discrimination cannot be constructed from Rose Acre's records because it is not there. Rose Acre did not engage in illegal price discrimination. Rose Acre engaged in legitimate price *competition*. This is precisely the type of competitive behavior "the antitrust laws are designed to protect." *Cargill*, 479 U.S. at 121 n.17 (quoting *Matsushita*, 475 U.S. at 594). As the Court of Appeals observed, Rose Acre deserves a medal, not a $28 million penalty. *See* App. A-17.

* * * *

Before closing, a few words should be said about Petitioners' unjustified personal attacks against Circuit Judge Easterbrook. See, e.g., Petition 5, 16 n.12 & 22. Apparently Petitioners have overlooked the fact that Judge Easterbrook did not act alone in this case; his opinion was joined by Chief Judge Bauer and Senior District Judge Grant, all of whom reached the same result arrived at by District Judge Noland. Nor is there any merit to Petitioners' contention that Judge Easterbrook imposed his own personal "agenda" upon this case. The principles of economic plausibility discussed in this case are precisely the same principles adopted by this Court in *Matsushita* and *Cargill*, and applied in similar fashion by courts within and without the Seventh Circuit. *See supra* at 22-23 & note 11.[22] Likewise, the absurd notion

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[22] In *Matsushita*, this Court cited and extensively quoted Judge (then-Professor) Easterbrook's writings as authority supporting the Court's decision. *See Matsushita*, 475 U.S. at 589, 591 n.15 & 595 (citing and quoting Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981), and Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 26-27 (1984)). Ironically, Petitioners now cite Judge Easterbrook's 1981 article as

that Judge Easterbrook was somehow acting to "repeal" the Robinson-Patman Act is belied by the Court of Appeals' approach to this Court's decision in *Utah Pie*. Petitioners' desperate resort to *ad hominem* attacks only confirms that there are no *issues* in this case worthy of review.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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February 2, 1990

"support" for their contention that Judge Easterbrook imposed his own private views on the law without mentioning that these same views were adopted by this Court in *Matsushita*.

Supreme Court, U.S.
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No. 89-1075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

A.A. POULTRY FARMS, INC.,
BOOMSMA PRODUCE, INC.,
BOOMSMA PRODUCE OF MISSOURI, INC.,
GRESSEL PRODUCE CO., INC.,
HEMMELGARN & SONS, INC.,
MENDELSON EGG CO. OF WEST UNITY,
a/k/a MENDELSON EGG CO.,
PETER PRODUCE, INC.,

Petitioners,

-VS.-

ROSE ACRE FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

> It is unfortunate but true that the standards by which a defendant's alleged predation will be judged vary greatly at this time depending on the circuit in which it happens to be sued.
>
> —Wall, *Predatory Pricing: Are Cost Tests On The Way Out?*, 4 Antitrust 40, 43 (Fall/Winter 1989) (discussing this case)

Failing to review the decision below would leave the Robinson-Patman Act buried in confusion—virtually unavailable to competing sellers or to anyone dealing in perishable products. The Act would be interpreted and applied not by its express terms, or its congressional purpose of catching the "weed in the seed,"[1] but by a hostile philosophy. Rose Acre's opposition to certiorari has three major flaws: (1) No potential litigant can review this "precedent" and know with any reliability what constitutes harm to competition under the Robinson-Patman Act, what he must prove about market characteristics, including whether a case must pass through the monopolistic recoupment "filter," and whether any evidence of actual predatory intent or below-cost sales is even relevant. However, the litigant can be sure that the standards *and* result will depend on which circuit is chosen as the forum. (2) The decision eviscerates the Robinson-Patman Act by making it largely unavailable to sellers of perishable products, thus eliminating coverage for much of the

[1] *See* Pet. at 12. The Petition for Certiorari will be cited as "Pet." and Respondent's Brief in Opposition as "Opp." References to the opinion below are to Appendix A to the Petition for Certiorari. Petitioners' Rule 29.1 list is contained in the Petition for Certiorari. (Pet. at ii).

grocery/food industry the Act was intended to protect. (3) Rose Acre's assertions about "fact-sensitive" issues, threatening this Court with the specter of sorting through boxes of records, correctly admit that "both" courts below made "de novo" "evidentiary assessments" and "evidentiary determinations," usurping the jury's verdict and function. (Opp. at 13). However, Rose Acre incorrectly and self-servingly assumes that this Court is being asked, or needs, to do the same.

1. **Conflicts and The Recoupment Standard.** Rose Acre's Opposition illustrates that, under any interpretation of the decision below, there is an unavoidable basic conflict among the circuits with respect to what proof of actual or likely antitrust injury is required under the Robinson-Patman Act. A fundamental issue is whether the injury to competition standard under the Robinson-Patman Act in a primary-line case is the same as under § 2 of the Sherman Act. Rose Acre contends that while the Seventh Circuit commended monopolistic recoupment as the threshold requirement for predatory pricing and condemned other approaches as doing "a great disservice to customers" (A-15), it nonetheless limited a monopolistic recoupment test to § 2 of the Sherman Act. However, Rose Acre's interpretation simply realigns the conflicts, placing the Seventh Circuit in conflict with, for example, the Eighth Circuit. Thus the Seventh Circuit opinion acknowledges that "several courts of appeals" have explicitly ruled that "the standard of primary-line liability under the Robinson-Patman Act should be the same as that under § 2 of the Sherman Act" (A-16), citing *inter alia*, the Eighth Circuit's Robinson-Patman Act decision in *Henry v. Chloride, Inc.*, 809 F.2d 1344, 1345 (8th Cir. 1987).

The conflicts are aptly demonstrated when Rose Acre asserts that there is no "chaos" in "the lower courts re-

garding either the meaning or effect of the *Matsushita*[2] economic plausibility requirement" (Opp. at 23), *i.e.*, a monopolistic recoupment standard. Rose Acre bases that erroneous proposition on *Henry v. Chloride, Inc.*, *supra*, which is one of the circuit court cases that has applied a monopolistic recoupment test *in a Robinson-Patman Act case*. Thus Rose Acre argues:

> As the Eighth Circuit has succinctly stated: "In essence, *Matsushita* imports a rule of impossibility into predatory pricing cases: if the defendant could not have captured the market, its conduct cannot be predatory, no matter what its 'intent.'" *Henry v. Chloride, Inc.* . . . . *And that is exactly how Matsushita has been uniformly applied both in the Seventh Circuit and in every other circuit in which the issue has arisen.*

(Opp. at 23) (emphasis added). That closing sentence implicitly recognizes that the monopolistic recoupment standard in fact governed the present case, but, if that is incorrect as Rose Acre elsewhere argues, then the conflict is between cases such as the present one and Robinson-Patman cases such as *Henry v. Chloride, Inc.*

It is also important to recognize that even a decision to apply *Matsushita's* principles to this case does not produce a judgment for Rose Acre or sustain the judgment n.o.v. The court below was not, as Rose Acre implies, "merely" following *Matsushita*. (Opp. at 9, 16, 22-23). In *Matsushita* this Court addressed an alleged conspiracy to charge prices "below the market level," *not* necessarily below costs. 475 U.S. at 584 & n.8. The majority noted that the expert's report relating to below-cost pricing was based on "assumptions" without "actual cost data" and

[2] *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

therefore found the trial judge's exclusion of that "persuasive," but the four dissenters concluded the below-cost pricing evidence was admissible and should have gone to a jury. *Id.* at 594 n.19, 606. Both the *Matsushita* majority and dissent considered that admissible cost evidence would be relevant. The majority even noted that proof of below-cost pricing would *negate* a "strong inference" that the pricing conduct was not "rational." *Id.* at 585 n.9. Judge Easterbrook turns that upside down by making monopolistic recoupment into an "initial hurdle" or prerequisite, which if not passed, is "*to cut the inquiry off at the pass*" and to make irrelevant both "inquir[y] into the relation between price and cost" and "questions of intent." (A-10) (emphasis added). Thus, while *Matsushita* was decided on summary judgment with no admissible evidence of below-cost pricing to show predatory conduct, in sharp contrast this case was heard by a jury presented with extensive evidence of below-cost pricing.

It blinks at reality to deny that the entire opinion below (including the issues discussed in Sections 2 and 3 below) was driven by the panel's strong view that the "best feasible test for predatory pricing cases" (A-16) was monopolistic recoupment and that "*to penalize [Rose Acre which it believed could not recoup losses from discriminatory prices] in the name of antitrust would do a great disservice to customers.*" (A-15) (emphasis added). The opinion avoids candidly pitting its view of economic "justice" against the Robinson-Patman Act but instead criticizes *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), as a "friend-less," disdained, and inferior rule inducing "civil disobedience in the judiciary." (A-16). No potential claimant in the Seventh Circuit can now initiate a primary-line Robinson-Patman Act case with a realistic hope of surviving the hurdles that will be encountered unless the defendant has the present market power (about

a 30% or higher share) (A-14) needed to pass the monopolistic recoupment test.

The Act was designed to attack *incipient* market concentrations. Pre-term concentrations (those that are developing but have not yet reached fruition) will not suffice if monopolistic recoupment is the exclusive threshold "filter." By holding a Robinson-Patman plaintiff to a standard impossible to meet, a recoupment "filter" predetermines the outcome. This case illustrates the point, for, by 1989, Rose Acre's post-trial production had reportedly grown to 10 million birds—dwarfing virtually all competitors.[3]

2. Perishability Consumes The Statute. Rose Acre barely addresses the petitioners' issue II—the Seventh Circuit's presumption that physically identical goods are not of like grade and quality if they are perishable. Rose Acre calls the issue "fact-sensitive" (Opp. at 26) when in reality it is a legal issue of great importance to the continued viability of the Robinson-Patman Act and the utility of the statute to the agricultural and grocery industry. Contrary to Rose Acre's arguments, the Seventh Circuit folded together the concepts of "like grade and quality" and perishability, eliminating the statutory requirement that perishability is considered only where there is "actual or imminent deterioration" of those goods. (A-22-24).

The Seventh Circuit made it the petitioners' burden to show that admittedly physically indistinguishable eggs were *not* properly subject to distressed sale as specials by Rose Acre. (A-22). The court states that petitioners' expert somehow "needed to account for the fact that some, perhaps most, of the specials were not 'like' eggs sold on long-term contract . . ." even though " 'special' eggs as delivered may be physically indistinguishable to

[3] *Egg Industry*, at 20-22 (Nov.-Dec. 1989).

the buyer. . . ." (A-23). This was Rose Acre's burden, not petitioners'.

Rose Acre's specials were, as Judge Easterbrook recognized, *exactly the same eggs that Rose Acre sold at its regular prices.* (Pet. at 20-22), and not occasional, temporary occurrences, but rather comprised one-third of Rose Acre's business, were guaranteed months in advance, and were not at all "special". The specials were offered not in response to any changing marketability, but as Rose Acre's discriminatory price scheme to market more eggs without across the board price cuts. (Pet. at 21 n.19).

The Seventh Circuit has made it the plaintiff's burden to prove that the perishability of identical grocery products—products actually possessed and sold by defendant—does not affect the "like grade and quality" prerequisite for price comparisons. After the decision below, defendant sellers, like Rose Acre, may slash prices to select customers on any perishable grocery product, regardless of whether a specific batch of goods is really spoiling or deteriorating, and the plaintiff will have the burden of locating proof negating any possible spoilage or deterioration. That turns the statute on its head and renders it useless to the agricultural industry it was enacted to protect.

3. The "Fact-Sensitive" Smoke Screen and Price Discrimination. Rose Acre's most pervasive attempt to defeat review presents the case as if this Court is being asked to examine "boxes" of records or a "series" of sufficient-evidence issues. Rose Acre admits that "both courts below" made "de novo" reviews and arrived at their own "evidentiary determinations." (Opp. at 13). The right to the jury trial and verdict were obliterated by such judicial "determinations" differing from the jury's and from one another. Most importantly, while Rose Acre

sought and benefited from improper post-verdict judicial fact-finding in both courts below, that fact-finding approach is inappropriate here and is used by Rose Acre to avoid and obscure the fundamental legal and policy issues involved in this case.

In addition to Rose Acre's purported fact "question" about perishability (*see supra* section 2), Rose Acre's *in terrorem* smoke screen about the other purported "fact-sensitive" issues can be removed readily:

(a) Rose Acre argues that the twenty or so pages of the Seventh Circuit opinion concerning harm to competition are "purely dictum," that the district judge "assumed" the jury had evidence to find price discrimination, and that the case turns solely on the Seventh Circuit's de novo evidentiary determination on price discrimination. (Opp. at 6 n.7, 17 n.12, 21). The proof of price discrimination was certainly not a basis of the district court's judgment n.o.v. The price discrimination question discussed de novo by Judge Easterbrook (A-21-23) has an answer that requires no box of documents and is irrefutable: Rose Acre had uniform base prices, which were not "long-term" deals, and base price changes were made uniformly at the same time for *all* customers.[4] Thus the "specials" in fact measured the occurrence and extent of discrimination; "mean" prices "blending" in the discriminatory specials were unnecessary to show the price discrimination; and the hypotheticals about when someone might have made (non-existent) long-term contracts fixing base prices were irrelevant.

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[4] *See* Pet. at 22-24 and references cited therein. For example: "Q. At the time that Rose Acre would implement a change in its basic price would new [pricing] letters go out to *all* of Rose Acre's customers? A. [by Rose Acre's Director of Marketing] Yes." (P.Ex. 103 at 9, 10/16/87 A.M., 116) (emphasis added).

Rose Acre has no answer to the existence of price discrimination and, therefore, responds only in the very generalities about "boxes of documents" that it condemns. (Opp. at 28-29). Judge Easterbrook erroneously assumed that long-term contracts locked in base prices causing them to vary depending on when the contract was made and, therefore, insisted on a blended price computation that was unnecessary to identify and measure the price discrimination here.[5]

The Seventh Circuit's skepticism about what it called "the formidable advantages a plaintiff enjoys under the Robinson-Patman Act" (A-23)—its view of the high desirability of a monopolistic recoupment "filter"—led it to engage in a de novo, hypothetical, and misguided special scrutiny of "price discrimination." (A-23). When the opinion below stated that because of those "advantages," "we are not disposed to stint on the demonstration" of price discrimination (A-23), it seems obvious that if the Robinson-Patman Act were viewed less hostilely—for example, if it were limited to firms with clear and present monopolistic recoupment power—then the panel would not have been "disposed" to make suppositions about the price discrimination proof.

(b) The Seventh Circuit expressly rejected Rose Acre's renewed attempt (Opp. at 13, 19) to create a judicial fact question about the existence of "oligopoly" or sufficient market concentration under *Utah Pie* or the Robinson-Patman Act (A-4, 18-19).[6] That Act's purpose, unlike the

[5] At oral argument Judge Easterbrook pressed plaintiffs' counsel to explain the proof of price discrimination, insisting: "But let's *assume* that the blended price matters." Tape of December 5, 1988 oral argument (emphasis added).

[6] In addition, substantial record evidence showed that the relevant markets are *not* national and that Rose Acre's ability to use

(Footnote continued on following page)

Sherman Act § 2 monopolization focus, is to catch "the weed in the seed." (Pet. at 12).

(c) As one writer observed, the "jury's verdict [in this case] required the Seventh Circuit to assume the truth of plaintiffs' evidence on costs and subjective intent," thus foreclosing the very fact arguments that Rose Acre erroneously presents to this Court to oppose granting certiorari. *See* Wall, *supra*, *Predatory Pricing*, 4 Antitrust at 41. The Seventh Circuit explicitly acknowledged the proof that Rose Acre's prices were below its average total costs (which are commonly similar to long-run incremental costs) and also below its average variable costs. (A-4, 19). Rose Acre admits that the district court decision "rest[ed] on different grounds." (Opp. at 14). Directly contrary to the district court, and in response to the primary focus of the plaintiffs' appeal, the Seventh Circuit agreed that the jury could properly find below-cost sales here that satisfied the Robinson-Patman Act. (A-4, 19).[7] Thus, it is fundamentally incorrect for Rose Acre to imply that in this case this Court would be addressing cost evidence or cost-standard choices and to argue that the Seventh Circuit "did not disturb" the district judge's below-cost "evidentiary determination" supporting his judgment n.o.v. (Opp. at 20).

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[6] *continued*

the specials to maintain discrimination between areas reflected the existence of separate markets and market power. "Price discrimination in sales of the same product cannot last long in a competitive market" so that the persistent discrimination "shows that the seller has market power." 2 P. Areeda & D. Turner, *Antitrust Law*, ¶ 514a at 342 (1978).

[7] Rose Acre's cost-standard arguments (Opp. at 20 & n.15) are grossly wrong as well as irrelevant, since quite different methods were used to measure different costs such as "LRIC" and "AVC."

(d) Similarly, contrary to Rose Acre's argument (Opp. at 14, 19), this Court is not being asked to review the sufficiency of the evidence of actual predatory intent. The issue is whether actual predatory intent is relevant in any way. Thus, the Seventh Circuit unmistakably spoke of "[s]tripping intent away" (A-12) and ruled "that intent plays no useful role in this kind of litigation." (A-10; Pet. at 14-15).

In short, this petition is not about factual disputes. Unless this Court grants certiorari resolving the basic antitrust injury, perishability exemption, and price discrimination standards, the rulings here and the conflicts among the circuits will both deter and smother the rights of competing sellers under the Robinson-Patman Act.

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